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No. 55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, *Appellant*,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, *et al.*, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF ANDREW J. DALLSTREAM

(*amicus curiae* in the proceedings below with respect to the interests of stockholders of E. I. du Pont de Nemours and Company)

AND MANUEL E. COWEN

(*amicus curiae* in the proceedings below with respect to the interests of stockholders of General Motors Corporation),

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF OF ANDREW J. DALLSTREAM AND MANUEL E. COWEN, AS *AMICI CURIAE*

INTRODUCTORY STATEMENT—INTERESTS OF AMICI CURIAE

This brief is filed jointly by Andrew J. Dallstream and Manuel E. Cowen, as *amici curiae*, pursuant to Rule 42 of the rules of this Court, and is accompanied by written consents of all parties.[1]

[1] For convenience these *amici* will be referred to herein in the third person or as "the undersigned", and the defendant companies will be referred to respectively as "du Pont", "General Motors", "Christiana" and "Delaware". Exhibits introduced by the Government, du Pont, General Motors, Christiana, and the undersigned Dallstream will be respectively referred to as follows: GX, DX, GMX, CX, ADX.

On September 25, 1957, following this Court's remand to the United States District Court for the Northern District of Illinois ("District Court"), the District Court held a pre-trial conference to discuss the procedure to be followed on remand and appointed the undersigned Dallstream as *amicus curiae* with respect to the interests of stockholders of du Pont[2] and the undersigned Cowen as *amicus curiae* with respect to the interests of stockholders of General Motors (R. 4-5). The District Court directed them "to protect the interests of the stockholders of [said corporations], * * * to offer plans, to make such reasonable investigation of the situation as is proper to enable them so to do and to study the various plans proposed by the litigants and to make their recommendations to the Court" (R. 10).

Pursuant to such appointment, the undersigned each extensively studied the pertinent facts and legal authorities and the various plans recommended by the litigants and other interested persons. Each of the undersigned also had separate meetings and correspondence with numerous stockholders of du Pont and General Motors, respectively, and

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[2] It is stated in note 2, page 6 of the Government's brief that the undersigned Dallstream "had been one of the defense counsel in the prior district court proceedings, representing certain minor members of the du Pont family who had been named as defendants". In fact, the undersigned Dallstream was appointed by the District Court on September 23, 1952, as guardian *ad litem* for twenty-one minors, and on January 16, 1953, the complaint was dismissed upon the Government's motion as to all but five of these minors. The complaint was amended to describe these five as "beneficiary defendants" who were named "as a party in interest but not a conspirator" because "their beneficial interests in trusts [holding stock of United States Rubber Company] may be affected by any relief granted herein * * *." Since the allegations pertaining to the conspiracy involving United States Rubber Company were dismissed, and such dismissal was not appealed from, the District Court never reached the questions with respect to which the undersigned Dallstream had been appointed guardian *ad litem*. 126 F. Supp. 235, 335.

each thereby obtained the views of, and became familiar with the potential impacts of various modes of divestiture on, the different types of stockholders of the respective corporations, such as individuals, corporations, trustees, investment trusts, educational institutions, charities, etc. In the course of these separate pre-hearing investigations the undersigned each studied a considerable number and variety of possible modes of relief—indeed every conceivable mode of relief suggested from any source or by his own experience and imagination. Thereafter, the undersigned filed separate reports containing their respective detailed recommendations as to appropriate relief and their reasons therefor.[3]

After the filing of such reports, the undersigned participated actively in the proceedings on relief before the District Court. In addition to presenting evidence and cross-examining witnesses, they filed motions pursuant to which the District Court ordered that tax rulings be obtained with respect to the plans proposed by the Government and by the undersigned Dallstream.[4] At the conclusion of the hearings, they filed separate memoranda on the issue of appropriate relief and participated in the framing of the Final Judgment of the District Court.

In summary, the undersigned each sought to assure that the issue of appropriate relief was thoroughly explored and that the respective viewpoints of General Motors stockholders and du Pont stockholders were fully expressed in the proceedings below. From the point of view of General

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[3] A copy of each of these reports has been transmitted to the Clerk of this Court as part of the record on appeal (R. 3314-15).

[4] On the invitation of the respective Congressional Committees, but not in his capacity as *amicus curiae*, the undersigned Dallstream appeared and testified in favor of pending legislation for tax relief in certain types of divestitures under the antitrust laws.

Motors stockholders, whose corporation has not been found to have violated the Clayton Act in any respect, the primary concern was and is to eliminate any incipient restraint of commerce without unnecessary losses to stockholders, in market values or otherwise. From the point of view of du Pont stockholders, most of whom became such during the forty-year interval between the acquisition and the finding of violation, there was and is the further concern that the necessary relief should not involve unnecessary tax burdens or market losses to them.

In the proceedings below, the views of each of the undersigned as to all legal questions and as to the appropriate mode of relief were broadly similar, although their specific recommendations differed in numerous respects, all as set forth in their respective reports and memoranda.[5] The judgment entered by the District Court, although again differing in many particulars, was generally in accord with the views and recommendations of each of the undersigned and embodied many specific features recommended by one or both of them; hence, their positions on this appeal are now identical—that the judgment of the District Court should be affirmed. Even though certain considerations and arguments may be of greater importance to one or the other group of public stockholders, it has seemed appropriate, for the convenience of the Court and the parties and to avoid duplication, to file a joint brief on this appeal, expressing the viewpoints of both groups of stockholders.

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[5] Very briefly stated, the undersigned, after making their separate investigations, each arrived at the conclusion that complete divestiture was not mandatory as a matter of law, that complete divestiture would produce undue and unnecessary tax and market impacts on innocent stockholders, and that effective relief could be afforded by stringent voting restrictions and injunctive provisions as suggested by each of them. The respective proposed decrees are printed at R. 30-45, 47-55.

SUMMARY OF ARGUMENT

I.

The Government's argument on this appeal is based largely on the premise that complete divestiture of the stock interest in General Motors is required as a matter of law. Such premise finds no support in the prior opinion and mandate of this Court, nor is it justified by the language or legislative history of the Clayton Act or by the decided cases.

As emphasized in the prior opinion, the nub of a violation of Section 7 is the effects of the acquisition as manifested or threatened at the time of suit; consequently, the function of a Section 7 remedy is to eliminate these unlawful effects. Section 15 confers broad equity jurisdiction on the district courts, without limitation, to fashion a decree that will serve this function by the means that are most appropriate in the circumstances of the particular case.

The cases show that, while divestiture is invoked where appropriate, it is not an absolute and exclusive remedy and in fact is not ordered where it would be inequitable or unnecessary or detrimental to the public interest. Even in a proceeding before a regulatory agency under Section 11, the language relied on by the Government applies only to stock "held * * * contrary to the provisions of" Section 7, so that remedial measures which effectively eliminate all offensive effects of an acquisition, and thereby assure that the continued holding is "solely for investment" and no longer contrary to the provisions of Section 7, would seemingly satisfy the Section 11 language. In any event, the equity powers conferred by Section 15 are not circumscribed by Section 11.

II.

It is apparent from the record that achievement of an effective remedy was recognized by the District Court to be its primary concern, and protection of stockholders a secondary consideration. On the other hand, the Court would have violated the mandate of this Court as well as its duty as a court of equity if it had ignored the latter consideration. The potential impacts on stockholders are particularly significant in this case, first, because unusual practical difficulties arise from the sheer magnitude of the quantities involved, and second, because the potential losses would fall on thousands of innocent persons who became stockholders during the forty-year interval between the original acquisition and the holding that a violation had occurred.

III.

The competitive evils found by this Court on the prior appeal were all concerned with the purchase by General Motors of du Pont products. The relevant market is automotive finishes and fabrics, in which du Pont is a supplier and General Motors is a buyer. With reference to this market and this supplier-buyer relationship, du Pont's bare ownership of General Motors stock has no separate significance because it cannot provide any economic incentive on the buying side of the market. If the ownership of General Motors stock by du Pont is the source of any threatened restraint in the finishes and fabrics market, this must stem ultimately, as the prior opinion recognized, from du Pont's use of its voting rights to select personnel in General Motors who would follow purchasing policies favorable to du Pont.

The injunctive provisions of the District Court's judgment are painstakingly fashioned to prevent any possible

use of the voting rights to select or influence personnel of General Motors in favor of du Pont. Voting rights are completely stripped from du Pont, Christiana and Delaware, and all persons connected with the management of any of them. This results in complete disfranchisement of a substantial part of the present du Pont and Christiana holdings and, as to the balance, there are "pass-through" mechanics which permit direct solicitation by General Motors (and opposition groups) of, and free exercise of voting rights by, some 194,000 du Pont stockholders not connected with du Pont management. There are corollary injunctive provisions, pervasive yet specific, against interlockings, against nomination or suggestion of personnel, and generally against any use by du Pont of its stock position to influence General Motors. There are also provisions dealing with trade relations and specifically barring certain anti-competitive possibilities suggested (but not proved) by the Government below. The Government's several lines of attack on these provisions are, for a variety of reasons, without merit.

IV.

The District Court properly rejected the Government's divestiture plan because it would have unnecessarily inflicted grievous losses on hundreds of thousands of innocent stockholders of the defendant companies. First, the proposed distributions of General Motors shares would have been taxable to non-corporate du Pont stockholders in a highly anomalous and confiscatory manner, economically equivalent to a capital levy of 5% to 28% of the total present value of each du Pont share. Second, since many individual holders and trustees would be compelled to sell rather than incur such levy, and since non-corporate purchasers would be "buying into" the same levy, there is uncontradicted evidence that the market price of du Pont

stock would be severely affected. Third, there was ample evidence to support the District Court's findings that the required annual sales of about 2,000,000 shares, coupled with a large volume of disorganized selling by stockholders induced by the Government plan, would seriously depress the market price of General Motors stock and thus inflict huge losses on the great body of General Motors stockholders and, indirectly, on the thousands of du Pont stockholders.

The Government's attempt to brush aside the market impacts as "short-range market fluctuations" ignores the evidence that the severe market declines would be likely to persist at least throughout the ten-year period of divestiture, and also ignores the fact that stockholders compelled to sell within the period would suffer permanent and irreparable loss even if the market depression were not permanent.

The Government's effort on this appeal to abandon its original plan, in favor of a new-found emphasis on latitude and freedom of choice for du Pont, must be rejected for various reasons. From the point of view of du Pont and General Motors stockholders, it is difficult to find any comfort in this new emphasis. Unless the underlying problems can be obviated, which the Government has not shown, stockholders will be hurt as much by a Hobson's choice granted to du Pont as by a positive mandate.

As to the specific suggestions in its brief, the first—exchange offers—is premised on assumptions, as to taxes and otherwise, that are not supported by evidence and appear highly questionable. The second—distributions in lieu of cash dividends—has already been the subject of considerable evidence and specific findings, to which the Govern-

ment makes no valid answer. The third—direct sales by du Pont of General Motors stock—while not directly considered by the Court below, would involve essentially the same factors and difficulties as the types of sales that were considered at length in the hearings and in the findings of the District Court.

The Government had the opportunity as well as the obligation in the proceedings below to make an affirmative showing of the fairness and feasibility of some particular plan of divestiture—not "divestiture" in the abstract—but it adhered inflexibly to its original plan. The record is not limited, however, to that plan, and the District Court expressly found, on the whole record, that there were no alternative modes of divestiture that would not have severe market and tax consequences. Not having established the necessity of complete divestiture or the feasibility of any particular plan of divestiture, the Government may not be heard to argue that further hearings will produce feasible alternatives.

V.

The extensive hearings already held have produced a combination of remedial measures that appear fully effective, without the inequitable side-effects of complete divestiture. The provisions of the judgment relating to retention of jurisdiction are so broad as to assure that, if future events or experience should prove the need, the Government may readily reopen the record to obtain further relief. In addition, the judgment may be re-examined in the event of remedial tax legislation. The combination of these two features gives further and ultimate assurance that effective enforcement will be achieved while unnecessary harm to innocent persons will be avoided.

ARGUMENT

I.

COMPLETE DIVESTITURE OF THE GENERAL MOTORS SHARES IS NOT A MANDATORY REMEDY, EITHER UNDER THE MANDATE OF THIS COURT OR UNDER THE CLAYTON ACT OR OTHERWISE

The major theme of the Government's brief, underlying its criticism of the procedure followed and the result reached by the District Court as well as its suggestions for further proceedings, is that complete divestiture by du Pont of all interest in the General Motors stock is required as a matter of law, irrespective of the particular circumstances and exigencies of the case. If, contrary to the Government's contention, complete divestiture is not required as a matter of law, then the underlying major premise of most of the Government's position on this appeal would fall. Point I of this brief will show that the Government's premise is invalid.

A. The Mandate Does Not Support, but is Contrary to, the Government's Premise

The duty of the District Court in the proceedings on remand stemmed, of course, from the mandate of this Court. It is noteworthy, therefore, that the Government does not once allude to the mandate in support of its contention that the District Court should have regarded divestiture as mandatory; and indeed its only reference to the mandate, on page 5 of the brief, is a very loose paraphrase—"to terminate the Clayton Act violation"—of the actual words of this Court. The actual words used were:

> • • • and that this cause be • • • remanded to the United States District Court for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the ef-

fects of the acquisition offensive to the statute in conformity with the opinion of this Court.[1] [R. 2]

These words manifestly do not support, but actually conflict with, the Government's contention. In the first place, even though the Government had specifically contended that divestiture was essential in view of the Clayton Act violation,[2] the mandate pointedly refrained from referring to divestiture or termination of the stock ownership. Secondly, the Court's opinion made clear that the "effects of the acquisition" to be eliminated were those aspects of the intercorporate relationship (at the time of suit, even though long after the acquisition) that gave rise to the probability of the creation of a monopoly—not the purchase or holding of the stock *per se*.[3] Third, the mandate required that the "necessary", "appropriate" and "equitable" relief be determined "after further hearing", and the opinion emphasized the District Court's large discretion in meeting the exigencies of the particular case—thereby clearly negativing any mechanical resort to mandatory divestiture in the absence of evidence as to need and consequences.

B. The Provisions of the Clayton Act and Precedents Thereunder Do Not Support the Government's Premise

In disregard of the plain wording of the mandate, and despite the fact that Section 15 of the Clayton Act vests

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[1] In the remand paragraph of its opinion, the Court went on to say: "The District Courts, in the framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.' *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401." (353 U.S. at 607-8.)

[2] Brief for the United States, in *United States* v. *E. I. du Pont de Nemours and Co.*, Oct. Term, 1956, No. 3, p. 149.

[3] See discussion at pp. 12-4, *infra*.

the district courts with broad and general equity jurisdiction, the Government contends that the District Court's discretion was limited to seeking some method of accomplishing complete divestiture of the legal title to the General Motors shares. This contention is rested in part on the nature of the violation ("where the illegal activity is the acquisition of stock, the relief contemplated is the divestiture of the illegal holding"; Br. 22, 30), and in part on the novel argument that the general terms of Section 15 are to be deemed limited by Section 11.[4] In the following sections it will be shown that the nature of the violation does not automatically compel divestiture, that even under Section 11 complete divestiture is not an automatic remedy, and that in any event Section 15 is not limited by Section 11.

1. The nature of the violation: Section 7.

The Government would read Section 7 as if the acquisition of shares of another corporation were a *per se* violation, crying out for the remedy of divestiture. Section 7 makes clear on its face, however, that an acquisition is unlawful only "where the effect * * * may be to substantially lessen competition" or restrain commerce or tend to create a monopoly of a line of commerce, and that an acquisition "solely for investment" and not used to bring about a substantial lessening of competition is not prohibited. These distinctions between lawful and unlawful acquisi-

[4] This argument seems never to have been made before, and it is contrary to the position expressed in 1957 by an official of the Department of Justice with respect to Section 15: "The proceedings being in equity, no rigid standard is imposed on the Attorney General as to the type of relief he may seek." Jacobs, *Antitrust Law: Consent Judgments in Merger Cases*, 43 A.B.A.J. 23 (1957). He then contrasted the latitude of relief in equity with what he regarded as the more rigid requirements imposed by Section 11.

tions were emphasized and explained in this Court's prior opinion, which pointed out that the primary aim of Section 7 is not to make unlawful *per se* the holding of stock of one corporation by another, but is to "arrest apprehended consequences of intercorporate relationships before those relationships could work their evil" (353 U.S. at 597); and further, that the test of violation is not whether an acquisition has occurred but "whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints" (*id.* at 607).[5]

Thus, the ultimate test of violation is not the acquisition *per se* but the effects of the acquisition as manifested at the time of suit. The nub of the violation is the "effects",

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[5] This Court expressly rejected the defendants' argument that an action could not be maintained under Section 7 if the acquisition was lawful when consummated:

> To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce. Even when the purchase is solely for investment, the plain language of § 7 contemplates an action at any time the stock is used to bring about, or in attempting to bring about, the substantial lessening of competition.
>
> Prior cases under § 7 were brought at or near the time of acquisition. [Citations omitted] None of these cases holds, or even suggests, that the Government is foreclosed from bringing the action *at any time when a threat of the prohibited effects is evident.* [353 U.S. at 597-8, emphasis supplied; see also *id.* at 589.]

As applied to the facts of this case, the Court noted that at the time of the acquisition du Pont's sales to General Motors "were relatively insignificant", since General Motors then accounted for only about 11% of total automobile production (*id.* at 599), in contrast to General Motors' industry position at the time of suit, when it accounted for more than 40% of sales (*id.* at 595).

hence the focal point of effective relief must be the effects.[6] In many cases, the best means of eliminating the effects may be to undo the acquisition itself—especially since in the normal case, unlike the present one, the "effects" would be manifested immediately and the proceedings would be instituted promptly after the acquisition—but there is nothing about the "nature" of the violation that automatically compels this result, as the prior opinion and mandate of this Court clearly recognized. (This is apparently also the view taken by the Department of Justice in a very recent Section 7 action with respect to the acquisition by Phillips Petroleum Company of 14.8% of the stock of Union Oil Company of California. The only divestiture relief prayed for in the Department's complaint was that Phillips and its officers "be required to divest themselves of Union's stock *in such amounts and under such terms and conditions as this Court may prescribe as necessary to dissipate the effect of the unlawful activities herein alleged.*"[7])

From this point of view, the Clayton and Sherman Act cases in which divestiture has been ordered[8] are less sig-

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[6] For this reason the Government's analogy to Section 8 of the Clayton Act (Br. 22) is erroneous. Section 8 is violated whenever the interlocking directorships exist, irrespective of competitive effects, and the manner in which the directors perform their duties is immaterial. *United States* v. *Sears, Roebuck & Co.*, 111 F. Supp. 614, 619 (S.D. N.Y., 1953). ("The vital distinction between § 7 and § 8, however, is that the latter omits the § 7 test * * *. The omission of 'substantially to lessen competition, or to tend to create a monopoly' from § 8 in contradistinction to its inclusion in § 7 * * * may not be deemed inadvertent.")

[7] *United States* v. *Phillips Petroleum Co.*, Civil No. C1-378-PH, filed December 9, 1960 (S.D. Cal.); Complaint, Par. V-4; emphasis supplied.

[8] By 1955, courts had entered divestiture decrees in only 24 litigated cases during the entire 60 odd years of Sherman Act history. *Report, Attorney General's National Committee to Study the Antitrust Laws*, 354 (1955).

nificant than the cases where divestiture has *not* been ordered. The former cases may show that divestiture is invoked where appropriate, but it is the latter cases which prove that divestiture is not an absolute and exclusive remedy. Being a harsh remedy, it is not to be used indiscriminately[9] and in fact is not ordered where to do so would be inequitable or unavailing or unnecessary or detrimental to the public interest.[10] For example, in *United States* v. *Terminal Railroad Association*, 224 U.S. 383, 410-11 (1912), the Court noted that the statutory purposes would be amply vindicated by dealing with the effects of the unlawful combination and that it would be to the public advantage to preserve the combination after the unlawful effects had been eliminated. In *United States* v. *Great Lakes Towing Co.*, 217 Fed. 656 (N.D.Ohio, 1914), *appeal dismissed*, 245 U.S. 675 (1917), the court held that stringent injunctive provisions gave greater promise of effective relief and better public service than did divestiture. In *United States* v. *General Shoe Corporation*, CCH Trade Cases, ¶68,271 (M.D.Tenn., 1956), the Department of Justice did not insist on the divestiture of properties acquired in violation of Section 7, partly for the reason that the properties would be of interest only to other manufacturers almost as large

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[9] See *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 603-4 (1951); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 446 (2d Cir., 1945); *United States* v. *General Electric Co.*, 115 F. Supp. 835, 864 (D.N.J., 1953); *United States* v. *Minnesota Mining & Mfg. Co.*, 96 F. Supp. 356, 358 (D.Mass., 1951).

[10] That these are all relevant considerations is shown in *Report, Attorney General's National Committee to Study the Antitrust Laws*, 355-356 (1955), which has been recognized by the Department of Justice as accurately restating existing law; see letter from Stanley N. Barnes, Assistant Attorney General, to William B. Carman, reprinted in part in *Proceedings of 1955 Annual Meeting of Section of Antitrust Law of American Bar Association*, p. 168.

as, or larger than, the defendant; see Jacobs, *Antitrust Law: Consent Judgments in Merger Cases*, 43 A.B.A.J. 23, 25-6 (1957)[11]. And in *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, 400-1 (S.D.N.Y., 1957), the district court specifically found that divestiture was not necessary to remedy the Section 7 violation involved.

These cases teach that the true intent of Congress, as expressed in Section 7, is most faithfully carried out if complete divestiture is invoked whenever necessary and appropriate to eliminate threatened restraints of commerce or threatened monopoly, but is not regarded as the exclusive and mandatory remedy for every unlawful acquisition.

2. The authority of the regulatory agencies: Section 11.

The Government relies heavily on the language of Section 11, which it reads as a command to order divestiture, in any proceeding before a regulatory agency, upon a de-

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[11] Other cases concluded by consent orders in which complete divestiture of unlawfully acquired stock or assets was not required are: *United States* v. *Schenley Industries, Inc.*, CCH Trade Cases, ¶68,664 (D.Del., 1957); *Union Bag & Paper Co.*, FTC Dkt. No. 6391, CCH Trade Reg. Rep. ¶25,999 (1956); *United States* v. *Hilton Hotels Corp.*, CCH Trade Cases, ¶68,253 (N.D.Ill., 1956); *United States* v. *Minute Maid Corp.*, CCH Trade Cases, ¶68,131 (S.D.Fla., 1955); *Scovill Mfg. Co.*, FTC Dkt. No. 6527, CCH Trade Reg. Rep. ¶26,206 (1956); *International Paper Co.*, FTC Dkt. No. 6676, CCH Trade Reg. Rep. ¶26,560 (1957). Also see *United States* v. *Lucky Lager Brewing Co. of San Francisco*, CCH Trade Cases, ¶69,160 (D.Utah, 1958), where the consent decree provided that if the illegally acquired assets could not be feasibly disposed of within nine months, the divestiture provisions of the decree could be cancelled upon petition of either party. These cases demonstrate that complete divestiture is not always deemed necessary to accomplish the statutory purposes.

termination that Section 7 is being violated (Br. 31). The Government does not state, nor could it, that Congress clearly expressed an intent to limit an equity court in a proceeding under Section 15 to the single remedy of divestiture, but it does urge that Section 11 is a "guiding light" to the true meaning of Section 15 and that the latter is "given content" by the former (Br. 30).

The first difficulty with this argument is that, even in Section 11 itself, the command to issue a divestiture order reaches, at most, to stock *"held • • • contrary to the provisions of"* Section 7. Since a stock acquisition may be lawful when made and yet become unlawful later, by changes in economic conditions that give rise to prohibited effects (see *supra*, pp. 12-4), it would logically follow that elimination of all attributes of stock ownership giving rise to the prohibited effects would remove the stock from the category of being "held • • • contrary to the provisions" of the Act. Similarly, since Section 7 expressly authorizes acquisitions "solely for investment", it would seem to follow that a stripping away of all features which distinguish an unlawful holding from a holding "solely for investment" would satisfy the command of divestiture in Section 11.[12]

There has been no decision holding that under Section 11 the regulatory agencies must order complete divestiture in all Section 7 cases, and the fact that these agencies have not always ordered divestiture of the illegally acquired

[12] As will be shown in Point III, the effect of the District Court's judgment is to convert du Pont's holding of the General Motors shares into one "solely for investment" and, it is submitted, no longer "held • • • contrary to the provisions" of the Act, so that divestiture of bare legal title, in addition to the divestiture actually ordered, would not be mandatory even under Section 11.

stock is a significant indication that Section 11 has not been so interpreted[13]. Moreover, this Court has often spoken of the Federal Trade Commission's broad discretion to frame remedies under the Clayton Act and Federal Trade Commission Act to fit the needs of the case.[14]

3. The equitable powers of the district courts: Section 15.

Even if it be assumed, contrary to the above, that the regulatory agencies are bound by the terms of Section 11 to order complete divestiture after any unlawful acquisition, there is an even more basic objection to the Government's contention that Section 11 is to be read as "giving content" to (*i.e.*, limiting the content of) Section 15. This objection is that neither the language or structure of the Clayton Act nor its legislative history gives any warrant for imposing such a limitation.

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[13] See *I.C.C.* v. *Baltimore & Ohio Railroad Company*, 183 I.C.C. 165 (1932); *In the Matter of Arrow-Hart & Hegeman, Inc., et al.*, 16 F.T.C. 393, 422-3 (1932). In its effort to distinguish the latter case, the Government in effect concedes the point made in the preceding paragraph of the text hereof, that divestiture of illegally acquired stock is not mandatory even under Section 11 if other features of the remedial order result in the stock being no longer held in violation of Section 7: "Since upon such divestiture [of other stock] the stock not divested would not be illegally held, there was no reason or basis for ordering it to be divested." (Br. 33, n. 21.)

[14] *Moog Industries* v. *F.T.C.*, 355 U.S. 411 (1958); *Jacob Siegel Co.* v. *F.T.C.*, 327 U.S. 608, 611-3 (1946); *F.T.C.* v. *Cement Institute*, 333 U.S. 683, 726-727 (1948); *F.T.C.* v. *National Lead Co.*, 352 U.S. 419, 428-429 (1957). In *Moog*, this Court spoke of the "administrative discretion that Congress has given the Federal Trade Commission" and observed that "in the shaping of its remedies within the framework of regulatory legislation [the Clayton Act], an agency is called upon to exercise its specialized, experienced judgment." (355 U.S. at 413.)

On its face Section 15 is a broad grant of equitable jurisdiction to the district courts to "prevent and restrain violations" in proceedings brought by the Attorney General, and there is no cross-reference to Section 11. Section 15 is identical with Section 4 of the Sherman Act, which, as Congress surely was aware, had been construed by this Court as vesting historic equity discretion in the district courts.[15] The legislative history of the Clayton Act, as recited by the Government (Br. 37-8), shows that Section 11, granting enforcement powers to administrative agencies, was added to the Bill after the substantive provisions had been completed and provision had been made in Section 15 for equity court enforcement. The Bill would have been complete and self-sufficient without Section 11, and there was no indication that the addition of Section 11 had any purpose other than the obvious one of providing an alternative system of administrative enforcement.

In this scheme of dual enforcement each avenue was made independent of the other.[16] The regulatory agencies, being creatures of Congress with limited powers, were to have only the authority expressly delegated to them.[17] The district courts were to have historic equity powers, as pre-

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[15] *E.g., United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911).

[16] *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953); *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 310 (1949).

[17] A broad grant of equitable power to the administrative agencies to "prevent and restrain" violations might have been deemed of doubtful validity. On the other hand, if the administrative agencies, as distinguished from courts of equity, were to have authority to order divestiture, nothing less than a specific grant of such authority would have sufficed. See *Arrow-Hart & Hegeman Electric Co.* v. *F.T.C.*, 291 U.S. 587 (1934); *F.T.C.* v. *Eastman Kodak Co.*, 274 U.S. 619 (1927).

viously developed in the administration of the Sherman Act.[18]

This Court has held many times that Congress must state its purpose unequivocally where it intends to make a drastic departure from the traditions of equity practice. Thus, in *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-30 (1944), this Court said:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied.

And in *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946):

> Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.[19]

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[18] As a result of this dual scheme of enforcement different results may ensue depending on the forum. *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 310 (1949) (standards of proof); *F.T.C.* v. *International Paper Co.*, 241 F.2d 372 (2d Cir., 1956) (preliminary injunction); *Arrow-Hart & Hegeman Electric Co.* v. *F.T.C.*, 291 U.S. 587 (1934), and *F.T.C.* v. *Eastman Kodak Co.*, 274 U.S. 619, 624 (1927) (available remedies).

[19] See also *Mitchell* v. *Robert De Mario Jewelry*, 361 U.S. 288, 290-92 (1960); *S.E.C.* v. *United States Realty and Improvement Co.*, 310 U.S. 434, 457 (1940); *Brown* v. *Swann*, 10 Pet. 497, 503 (1836).

Another indication that Congress did not intend to limit the powers of equity courts under Section 15 is contained in Section 7 of the Federal Trade Commission Act, 38 Stat. 722, 15 U.S.C. 47, which provides:

> That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. * * * [T]he court may adopt or reject such report, in whole or in part, *and enter such decree as the nature of the case may in its judgment require.* [Emphasis supplied.]

This statute was enacted less than three weeks prior to the Clayton Act, and it was subsequently amended to include the Clayton Act in its definition of "antitrust Acts." (Section 2 of Act of March 21, 1938, 52 Stat. 111.) Congress thereby unmistakably expressed the intention that an equity court in a proceeding under Section 15 of the Clayton Act would have full power, without limitation, to "enter such decree as the nature of the case may in its judgment require".

The above discussion shows that the District Court's conception of its duty was wholly in accord with, whereas the Government's conception is in conflict with, the mandate and the applicable law. In the remainder of this brief it will be shown that the proceedings in the District Court afforded full opportunity to explore the question of appropriate relief in all its ramifications, and that the Court's solution was eminently sound.

II.

THE DISTRICT COURT CLEARLY RECOGNIZED THAT ACHIEVEMENT OF ANTITRUST OBJECTIVES WAS THE PARAMOUNT NEED, BUT IT PROPERLY SOUGHT TO AVOID UNNECESSARY HARM TO INNOCENT PERSONS IN ACHIEVING THIS PARAMOUNT NEED

The Government asserts repeatedly (*e.g.*, Br. 19, 57, 58) that the District Court gave primary consideration to the impact on stockholders and only secondary consideration to the problem of enforcement. This is not a fair or proper reading of the record. There is no doubt that the Court believed that the impact on stockholders is a consideration of unusual importance and difficulty in this case, but neither is there any doubt that the Court treated this consideration as being subordinate to the primary need of achieving an effective remedy.

When taken in context, the words excerpted by the Government to suggest the contrary are seen to be quite misleading. Thus, in the first pre-trial proceedings following remand (R. 4) the Court urged counsel to be mindful of the necessity of framing a decree "*that will protect the public interest* in a manner least disturbing to the economy, and least harmful to the litigants and to the stockholders • • • ." (Emphasis supplied.) Again, at the opening of the hearings the Court stated (R. 261): "The primary problem • • • is • • • to promulgate a decree *which will remedy the violation of Section 7 of the Clayton Act*, without penalizing those who may become the innocent victims of this case • • • ." (Emphasis supplied.) Again, in its opinion, the Court stated (R. 3196):

> Under the mandate of the Supreme Court it is the responsibility of this Court to frame a judgment which will eliminate the effects of du Pont's acquisition of stock of General Motors which are offensive to the statute. • • • Accordingly, *the problem before this*

Court is one of devising a judgment that will effectively guard against the probability of restraint or monopolization which the Supreme Court found to exist.

The primary duty of the Court is therefore clear. But in the performance of this duty, particularly as it may involve a choice among different remedial measures *that will be equally effective to achieve the statutory purposes,* there are certain other considerations that should not be ignored. [Emphasis supplied.]

In this context, the Court's statement (referred to at Govt. Br. 19, 57) that the "big" problem is to avoid punishing innocent people clearly refers to the relative difficulty, not the relative priority, of the problem.

Similarly, although the District Court recognized that courts have frequently taken into account whether the violation was one that "could reasonably have been thought permissible,"[1] and that there had been no fraudulent or improper conduct on the part of the officials of the defendant companies (R. 3198-9), yet the opinion noted that these considerations did not "in any way mitigate or qualify the duty of this Court to frame a decree that will effectively remove and guard against the effects of the acquisition of the stock which have been held to be offensive to the statute" (R. 3199), and "that the appropriate relief is that which is necessary to eliminate the effects of the acquisition offensive to the statute" (R. 3198).

While there is thus no basis for intimating that the District Court "gave primacy" (Govt. Br. 57) to anything but effective enforcement, this is not to say that the Court

[1] This language was quoted from this Court's opinion in *United States* v. *U. S. Gypsum Co.*, 340 U.S. 76, 89-90 (1950). The District Court also cited *F.T.C.* v. *National Lead Co.*, 352 U.S. 419, 429 (1957), and *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 348 (D. Mass., 1953), *affirmed per curiam* 347 U.S. 521 (1954).

could properly have focused its attention solely on this criterion, to the exclusion of considering the impact on innocent persons. To have done so not only would have been contrary to the express mandate of this Court to determine "the *equitable* relief *necessary* and *appropriate*" in the circumstances, but would have been to ignore the teachings of many decisions under the antitrust laws to the effect that an equitable decree should be molded to fit the exigencies of the particular case,[2] that the end to be served is remedial, not punitive,[3] and that the antitrust needs should be served with minimum injury to innocent persons.[4]

These latter considerations of equity are of particular urgency in the instant case. For one thing, the case is distinguishable from most others because of the vast quantities involved. This factor of sheer size undoubtedly lends urgency to effective enforcement of antitrust requirements, but it also undoubtedly complicates the problem of avoiding inequitable side-effects. Thus, many types of transactions—including some types of sales, exchanges or distributions of stock—that might be feasible and equitable in dealing with smaller quantities become impractical, if not impossible, where the quantities are greatly multiplied.

An even more important distinction from the normal case is the interval of forty years between the time of acquisi-

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[2] *International Salt Co.* v. *United States*, 332 U.S. 392, 400-1 (1947); *United States* v. *National Lead Co.*, 332 U.S. 319, 335 (1947).

[3] *Standard Oil Company* v. *United States*, 221 U.S. 1, 77-8 (1911); *International Salt Co.* v. *United States*, 332 U.S. 392, 401 (1947); *United States* v. *National Lead Co.*, 332 U.S. 319, 338 (1947); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 603 (1951); *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 409 (1945).

[4] *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185 (1911).

tion and the holding that the Clayton Act was violated. In the normal situation the sanctions of that statute would be invoked promptly after, if not before, a prohibited acquisition. In contrast, the forty-year interval in this case permitted many thousands of new investors to become stockholders of the defendant companies under the not unreasonable impression that the acquisition was perfectly lawful.[5] These many thousands of investors manifestly have no right to claim that the remedy should be less than fully effective; but, being innocent of any unlawful conduct, they surely may appeal to the conscience of a court of equity to achieve an effective remedy with minimum burden and loss to themselves. This is in accord with this Court's holding in *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185 (1911), that one guide in the framing of equitable relief must be—

> • • • a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning.

In its painstaking search for an effective remedy with minimum injury to innocent persons, the District Court did no more and no less than required by the mandate of

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[5] During the 35 years of Clayton Act history before this action was brought, the Government had not invoked Section 7 against vertical acquisitions and the Federal Trade Commission had said that the section did not apply to vertical acquisitions. 353 U.S. at 590. Moreover, it had never before been held that the competitive effects of an acquisition were to be judged as of any time other than the time of the acquisition; indeed, all prior cases brought under Section 7 were brought at or near the time of the acquisition. 353 U.S. at 598.

this Court and by established doctrines governing a court of equity.

It may be appropriate to add that, although this painstaking search was time-consuming, there is no warrant for any suggestion of dilatoriness—if the Government means to make such suggestion (Br. 80). The District Court sought at all times and in every possible way to expedite the matter (*e.g.*, R. 83, 1312, 2639, 3335), and the length of time between the receipt of this Court's mandate and the entry of the District Court's judgment was due to inherent and unavoidable needs of the situation, including needs of the Government itself.[6]

III.

THE COMPREHENSIVE INJUNCTIVE PROVISIONS OF THE JUDGMENT ARE CAREFULLY PATTERNED TO MEET THE NEEDS OF THIS CASE AND GIVE EVERY ASSURANCE OF EFFECTIVELY ELIMINATING THE OFFENSIVE EFFECTS OF THE ACQUISITION

A. The Competitive Problem to be Resolved

The duty of the District Court was to frame relief that would "eliminate the effects of the acquisition offensive

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[6] The mandate was received on July 18, 1957, during the summer recess. The District Court re-convened in September and promptly established an order of procedure, the first step in which was the filing of the Government plan in late October. Thereafter the proceedings were in effect suspended for nearly six months while a tax ruling on the plan (which was recognized by all parties, including the Government, to be essential for meaningful consideration of the plan) was applied for and obtained (in May 1958). The proposed plans and comments of other parties and the *amici curiae* were all filed by mid-August, and the Government's reply thereto in late September. In October the Government announced its intention to commence discovery proceedings, and such proceedings were not finished until January, 1959. Two months were consumed in the actual trial, which commenced in February and ended in April. The Court allowed a total of only two months for briefing by all parties, rendered its opinion immediately after the 1959 summer recess and, after further proceedings, entered its judgment in November.

to the statute". In determining what were the offensive effects to be eliminated, it is necessary to put this phase of the case in its historical context. The original complaint charged, in addition to the Clayton Act violation, that du Pont's acquisition of General Motors stock violated Sections 1 and 2 of the Sherman Act, and alleged in support thereof that a number of preferential practices existed between du Pont and General Motors. The Sherman Act charges were dismissed for failure of proof—indeed, there was a complete absence of proof tending to show any favoritism by du Pont for General Motors or its products.

The competitive evils found by this Court on the prior appeal were all concerned with the purchase by General Motors of du Pont products, and there was no discussion whatsoever as to any potential competitive danger relating to du Pont's favoring or promoting General Motors' business. The relevant market was automotive finishes and fabrics, in which du Pont is a supplier (353 U.S. at 593-5), not automobiles or other products of which General Motors is a supplier. Consequently, the prime evil to be remedied was the power of du Pont to bring its influence to bear within General Motors in order to achieve a "commanding position as General Motors' supplier of automotive finishes and fabrics" (*id.* at 588-9).

What, then, are the aspects of du Pont's ownership of General Motors stock that might have enabled du Pont to influence General Motors' purchases? There are two primary types of rights involved in the ownership of stock, (1) voting or control rights, and (2) investment or economic rights. In appraising the significance of each of these as a possible source of restraint, it obviously is important to distinguish between, on the one hand, a case where the company whose stock is owned is a seller in the relevant market and, on the other, a case where such company is a

buyer in the relevant market. Even if it be assumed that the investment and economic rights could be significant in the former case, they cannot be of significance in the latter case because there is no stock ownership on the part of the buyer that can provide economic incentive *on the buying side*. The present case is of the latter type, *i.e.*, the relevant market is one in which General Motors is a buyer and du Pont is a seller, so that du Pont's mere "stake" in General Motors cannot provide any economic incentive for General Motors to buy from du Pont. Hence, the source of any threatened restraint in the relevant market must ultimately be du Pont's use of voting rights to select and influence personnel *in General Motors*, where the buying occurs.

The discussion in this Court's prior opinion shows clearly that it was du Pont's voting rights in General Motors, and not its economic and investment rights, that were deemed the potential source of restraint in the relevant market. For example, in the Fisher Body Company incident, the Court stated that the Fisher brothers were able to withstand efforts to get them to switch to du Pont products, even though General Motors had acquired 60% stock control, because a voting trust had been established giving the Fishers broad powers of management. 353 U.S. at 604-5. Also see the Court's reference, at 353 U.S. 603, to the potential "impact upon purchasing officials" in General Motors.

B. The Effectiveness of the District Court's Judgment

The injunctive provisions of the District Court's judgment are painstakingly fashioned to eliminate any possibility of such "impact" on the personnel or the purchasing policies of General Motors in the future. They are pervasive and inclusive, yet detailed and specific, and are uniquely

suited to deal effectively with the competitive evil found to exist.

Actually, the judgment contains several different categories of provisions, so as to give multiple assurance that du Pont's bare retention of legal title[1] will leave no possibility of restraint or monopoly. First and foremost are the provisions dealing with voting rights on the General Motors stock: As a first step, all voting rights are taken away from du Pont and Christiana as holders of General Motors stock (Section VI; R. 3304). The voting rights on du Pont's holding are required to be "passed through" to some 194,000 (DX 50, R. 2229, 3057) record stockholders of du Pont (Section VII; R. 3305), and mechanics are established whereby General Motors proxy material (including "opposition" material) must be transmitted directly to these 194,000 holders, and proxies may be returned directly by them, without any participation (other than strictly mechanical) by du Pont, Christiana or Delaware (*ibid.*). Each of the latter companies (herein called the "du Pont Companies") and their managements, including immediate families, are enjoined from exercising direct or "pass-through" voting rights or otherwise participating

[1] Section III of the judgment (R. 3301) orders du Pont and Christiana each to take the steps provided in the judgment "to divest itself of all rights and interest in the General Motors stock which each owns except bare legal title, the right to receive dividends, the right to participate in the distribution of assets upon dissolution and any other right or interest which is reserved to them or either of them under the provisions of this Judgment." The record shows that for many years du Pont has passed on to its stockholders the dividends received from General Motors less the tax thereon, and that du Pont intends to continue this policy (R. 1913). Consequently, the only attributes of stock ownership practically retained by du Pont under the judgment are bare legal title plus the right to share in the assets of General Motors in the event of liquidation. (R. 3243-4.)

in or influencing the voting process in any way (Section VI; R. 3304).

Voting rights do not in any circumstances pass to or through Christiana or Delaware, or to anyone in the management of any of the du Pont Companies (including immediate families),[2] with the result that a substantial portion of the present du Pont holding (in addition to all of the present Christiana holding) is simply disfranchised.[3] As a result, the entire voting rights on 63,535,500 shares of General Motors stock heretofore concentrated in the du Pont Companies will be either eliminated or else scattered among 194,000 persons, not including any of the du Pont Companies or their managements, the latter being completely barred from influencing the voting process.

Under a related set of provisions all interlockings of personnel between General Motors and the du Pont Companies are barred, in such manner as not only to prohibit any individual from serving both sides concurrently but also to prevent any shift from one side to the other in the future (Sections IV-A and IV-B; R. 3302). Likewise, there is a complete ban against the du Pont Companies nominating or proposing management personnel of General Motors (Section IV-C; R. 3302). Finally, in this category, there is

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[2] In certain special cases (where necessary to provide a quorum) the District Court may permit the pass-through vote of Christiana and Delaware to be exercised under supervision, but in no event may any of the enjoined persons exercise any discretion as to how the stock shall be voted (Section VII-D of the judgment; R. 3307).

[3] At the annual meeting of stockholders of General Motors held May 20, 1960, the first held pursuant to the judgment, a total of 21,676,576 shares (7.7%) of General Motors stock were disfranchised. See First Report of Monitor Scott W. Lucas to the District Court.

a general prohibition against the du Pont Companies "using or attempting to use, directly or indirectly, the stock ownership of du Pont or Christiana in General Motors, to influence or control General Motors in any manner whatsoever" (Section III; R. 3301-2).

The second group of injunctive provisions deals with trade relations between du Pont and General Motors (Section V; R. 3303). The District Court found that these provisions had not been shown to be necessary, but it resolved all doubts in favor of the Government (R. 3250-1, 3259-60).[4] These provisions assure, among other things, that any contractual arrangements between the defendants that would prevent General Motors from freely selecting its suppliers will be terminated and that the defendants will not deal preferentially with one another with respect to products developed by either of them or patents, processes or discoveries owned by either of them.

The third group of provisions designed to assure that the violation will be completely neutralized is the District Court's retention of jurisdiction, with related reporting obligations and visitorial rights (Sections IX, XI, XII; R. 3309, 3311-2). As is pointed out in more detail in Point V, *infra*, the Court can thus impose complete divestiture at any time if events should prove such remedy to be necessary. To aid in determining the effectiveness of the judgment, the Court has appointed a monitor to review and police the operation of the voting provisions (Section VII-F of the judgment, R. 3308; R. 3312) and has also granted the

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[4] The District Court's reasons for including these provisions are clearly stated and there is no warrant for describing their inclusion as "a veiled recognition that merely restricting voting rights will not prove effective" (Govt. Br. 51).

Attorney General extensive supervisory powers in aid of enforcement.

C. The Government's Criticisms of the Judgment

The Government condemns these injunctive provisions sweepingly (Br. 41-58) but not cogently. The Government's first contention is that du Pont's continued investment in General Motors, though stripped of voting power, will still give du Pont "constant motive and incentive to promote the business and profits" of General Motors (Br. 42). However, as the Government itself recognises, this is the reverse of "the relationship considered by this Court in its ruling on violation—favoritism of du Pont on the part of General Motors" (Br. 43)—*i.e.*, favoritism "in the area of supply of * * * specific automotive products" (*ibid.*). The Government, without any supporting evidence or findings, would now turn the case around and deal with the wholly new area of du Pont's favoring General Motors in the automobile market. Indeed, the Government ultimately bases its plea for divestiture, not on existing relationships, but on "all the other business and financial relationships or fields of possible competition between the two companies and between each of them and other chemical and automobile concerns" (*ibid.*), which have not been the subject of pleadings, evidence, or findings.

This is not merely ranging far afield, it is straying outside the permissible bounds of this case. It is true that an equity court need not narrowly limit its relief to an injunction of the proven violation—thus, all roads to a *prohibited goal* may be closed against a proven transgressor (*International Salt Co.* v. *United States*, 332 U.S. 392, 400 (1947)) —but the relief must nevertheless be connected with the practices actually found to be illegal. *United States* v. *U. S.*

Gypsum Co., 340 U.S. 76, 88-89 (1950). For this reason, "a finding of an offense under the antitrust laws does not invest a court with a license to embark upon a general program of comprehensive control of the defendants' business. The limits of the controversy must be observed." *United States* v. *National City Lines, Inc.*, 134 F. Supp. 350, 355 (N.D. Ill., 1955).[8]

The Government is also critical, however, with respect to the District Court's handling of the relationship actually considered by this Court in its ruling on violation—"favoritism of du Pont on the part of General Motors" (Govt. Br. 43). The brief states broadly that "General Motors will necessarily conduct its affairs with knowledge that du Pont owns 23% of its stock" (*ibid.*), if only because "any conscientious management must, in handling other people's money, take into consideration the interests of those investors, as trustees do, even if formal power to direct them or fire them is absent" (Br. 44). Not only do these sweeping statements purport to negate Congress's own assumption, in Section 7 of the Clayton Act, that there may be acquisitions solely for investment and not used to bring about a lessening of competition, they also express a most strained and strange concept of conscientiousness. It may be conceded that a conscientious management is solicitous of the interests of investors *as investors*, even though without voting rights, but "conscientious" is hardly an apt description of a management that would be solicitous of the interests of investors *as potential suppliers* in the face of the District Court's judgment.

[8] This is especially true when the Government's case is based on narrow issues. In such event, the retention of jurisdiction will sufficiently assure that new problems will be effectively controlled by the court if the need should arise. *Associated Press* v. *United States*, 326 U.S. 1, 22-3 (1945).

The Government proceeds with the broad statement that the influence assumed to result from du Pont's ownership of bare legal title "will be buttressed by the right to vote * * * lodged in du Pont's stockholders" (Br. 44). Since the "pass-through" voting rights will be exercisable only on direct solicitation by General Motors or opposition groups, and without participation by the du Pont Companies, it seems quite far-fetched to assume either that General Motors personnel will feel, or that any of the 194,000 du Pont stockholders will exert, any compulsion in favor of du Pont products. That this is a make-weight argument is further indicated by the fact that under the plan of divestiture which the Government proposed to the District Court du Pont stockholders would have had an even larger voting power in General Motors (R. 13-4, 3255).[6] And the same would be true even under the Government's suggestions in its present brief, to the extent that du Pont stockholders might acquire General Motors stock by distribution, exchange or purchase. In any event, if "pass-through" of voting rights to 194,000 scattered stockholders not connected with management is really a source of difficulty, the effective solution would not be divestiture but

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[6] Since the Government itself recommended divestiture by distribution, it is difficult to understand why it cites *United States* v. *Union Pacific Railroad Co.*, 226 U.S. 470 (1913), for the proposition that such a divestiture would be inadequate (Br. 53). The Government must concede that the circumstances of this case are different from those of *Union Pacific*; otherwise it would not have proposed a form of divestiture condemned in *Union Pacific*. It is also difficult to understand the relevance of the citation of *Paramount* and *Hughes* (Br. 54-5). This Court did not say, as the Government implies, that a 24% voting interest in one company and a non-voting interest in another would endanger the independence of the two companies. To the contrary, the Court held that this was an issue which could be resolved only after hearing.

complete disfranchisement of all shares now held by du Pont and Christiana.[7]

The Government also expresses concern that "practices and viewpoints developed during many years" would be likely to promote continuation of a du Pont-oriented management (Br. 44-5). Since under the judgment there will be no affirmative means of perpetuating or re-invigorating any "historical ties and associations" that may have developed, this problem would seem to be no different than if legal title were summarily divested. Under either form of relief the mere continuity of past associations and ties, if significant, may be expected to be fully dissipated with, and only with, the passage of time.

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[7] Previously, the Government has not been concerned with the general body of the du Pont stockholders becoming owners of General Motors stock, but only with certain categories of stockholders who together would own 8% of General Motors if the du Pont and Christiana holdings were distributed through Christiana and Delaware to their stockholders. In this connection, Assistant Attorney General Bicks testified before the Senate Committee on Finance that the Government felt the 8% would raise "the potential of significant control", but that if the Government was wrong in this assumption, distributions to these stockholders "would fully serve competitive goals". *Hearings on S. 200 before the Senate Committee on Finance*, 86th Cong., 1st Sess., 325-6 (1959). Since the judgment does not permit voting rights to be passed to or through Christiana or Delaware or to persons connected with management of any of the du Pont Companies, a major part of the 8% would be completely disfranchised and it would seem that the voting provisions "fully serve competitive goals". (See R. 3253-55, where this issue is discussed in the District Court's opinion.)

It is noteworthy that, in the course of its argument as to how market impacts might be minimized, the Government appears to abandon completely its theoretical concern as to the stockholders of Christiana and Delaware (Br. 62, n. 40; *id.*, 70, n. 51).

Finally, in support of its argument that dealing with voting rights is insufficient, the Government cites certain decisions of the Securities and Exchange Commission ("SEC" or "Commission") under the Public Utility Holding Company Act of 1935 (Br. 47-9). These decisions have only distant relevance, if any, to the present case.

Apart from the important factual distinctions mentioned below there are two circumstances which render these decisions inappropriate as precedents: (1) the SEC (like the Federal Trade Commission under the Clayton Act) is more limited than a court of equity in its choice of remedies, and (2) the impact of taxes did not have to be a matter of concern in the choice of remedies, because of special tax legislation (Int. Rev. Code of 1954, §§1081-3).[8]

H. M. Byllesby & Company, 6 S.E.C. 639 (1940), and *International Paper and Power Company*, 2 S.E.C. 274, 277-8 (1937), involved the question of the sufficiency of a voting trust as a means of terminating control. The Government's reliance on them is apparently founded upon the premise that the "pass-through" provisions of the judgment are somehow analogous to a voting trust, whereas in fact they are quite opposite. The judgment disperses voting rights among 194,000 stockholders acting completely independently, whereas a voting trust concentrates control in trustees who thus are truly in a position "to insure management control" (Govt. Br. 47, n. 32). In *Byllesby* the adverse holding was based primarily on lack of independence of the trustees, for which there is no counterpart

[8] Cf. *infra*, p. 53, and p. 70, n. 2.

in this case.' In *International Paper* the Commission did not reach the question of the adequacy of the voting trust but stated that the determination "can obviously better be reached after observation and upon a record of experience".

Manchester Gas Company, 7 S.E.C. 57 (1940), involved a shift of voting rights from common to preferred stock with continuing holding company controls—practically every phase of the subsidiary's operations (accounting, engineering, insurance, taxes, etc.) remained under direct supervision of the holding company—that are not comparable to anything shown in the present record. In *United Corporation*, 13 S.E.C. 854 (1943), the Commission noted that the provision dealing with voting rights was "incidental and temporary only" (13 S.E.C. at 882), *i.e.*, the full voting rights would resume as soon as holdings in subsidiary companies had been reduced to less than 10%, and even during the period of temporary suspension the holding company retained the "discretion to vote its holdings when it so chooses" (13 S.E.C. at 898) with only the risk of being required to re-register. Thus, the subsidiaries would have continued to be subject to the *voting* influence

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'The Commission also recited numerous facts and circumstances which had continued to exist under the voting trust, but which are of the very kind that would be rendered impossible under the judgment in this case. Although interlocking officers and directors had been removed, "Byllesby continued to maintain its offices on the same floor as those of Standard Gas. Byllesby and Standard Gas used the same telephone number. Officers of Standard Gas and of Standard Power continued throughout most of this period to use Byllesby's private wire between New York and Chicago. Many of the officers and directors of the Standard system who continued to operate the system were substantial stockholders of Byllesby." (6 S.E.C. at 655.)

of the holding company, even apart from the elaborate pattern of historical relationships which were not to be terminated.

These cases stand for the proposition that purely mechanical changes in voting rights are not effective in a context of facts and circumstances assuring continuity of control through other means. In the present case, even if the historical pattern were comparable, which it is not, continuity is precluded by the judgment. It is noteworthy that in a very recent decision, *Electric Bond and Share Company,* Holding Company Act Release No. 14326 (December 6, 1960), the Commission permitted permanent retention of a reduced, but still substantial, holding of a former subsidiary in reliance on conditions contained in its order very comparable to certain provisions of the judgment here (prohibitions against acquiring additional voting stock, against interlockings, and against inter-company "services", and a reservation of jurisdiction to revoke the exemption or impose additional conditions "if such action should become necessary in the light of the experience with the conditions that have been imposed." *Id.* at 27-9).

As seen in A and B above, the judgment here effectively reaches and eliminates the offensive effects of the acquisition—unlike the "modal arrangements" condemned in the Holding Company Act cases cited. Indeed, the judgment requires divestiture of all attributes of ownership that caused the stock to be held "contrary to the provisions" of Section 7. The bare legal title remaining in du Pont will be held "solely for investment", so that the full antitrust objectives will be accomplished without the need for further divestiture.

IV.

THE RECORD FULLY SUPPORTS THE DISTRICT COURT'S FINDINGS THAT THE GOVERNMENT'S PLAN OF DIVESTITURE WOULD INFLICT, ON WHOLLY INNOCENT PERSONS, AN EXTRAORDINARY AND CONFISCATORY BURDEN OF TAXES AS WELL AS SEVERE LOSSES OF MARKET VALUES, AND THAT SIMILAR BURDENS AND LOSSES WOULD BE INHERENT IN ANY PLAN OF COMPLETE DIVESTITURE

A. Tax Impacts of Government's Original Plan on du Pont Stockholders

The record is clear and convincing that complete divestiture as proposed by the Government would impose an extremely harsh, and quite extraordinary, burden of taxes on du Pont stockholders.

A principal feature of the Government's proposal below was the requirement that the General Motors stock be distributed to du Pont stockholders (other than certain specified ones) in ten annual installments. In order that there would be no controversy as to the exact tax consequences, the District Court ordered that a ruling be sought from the Commissioner of Internal Revenue. The ruling (ADX 2; R. 1313, 3171 *et seq.*) was to the effect that the distributions would be taxable as ordinary dividends—*not* on a capital gains basis—and that the taxable amount of the distributions for all non-corporate stockholders of du Pont would be the fair market value of the General Motors shares distributed.

Based on recent market levels of approximately $40 per share of General Motors and $190 per share of du Pont, the Government's proposal would call for the distribution of about $55 in market value (1.38 shares of General Motors) for each du Pont share, so that by the end of the distribution period each du Pont stockholder would have

had returned to him about 30% of the present market value of his investment in du Pont. But of this 30% of total market value, between 16% and 87% (depending on the individual tax bracket and assuming maximum benefit of the 4% dividends received credit) would be taken away by the Federal income tax alone.

The record shows, on the basis of an objective and reliable survey (R. 3205-6), that there are approximately 230,000 non-corporate stockholders and trust beneficiaries, owning about 25,000,000 du Pont shares in the aggregate, who would be taxed on the above basis (DX 25; R. 1376, not printed in record). The total additional Federal income taxes[1] that these persons would be required to pay *each year* over the ten-year period were estimated at more than $77,000,000 if the General Motors shares should have a market value of $39.20 per share (*ibid.*). In short, assuming such market price, the distributions would force some 230,000 non-corporate holders of du Pont stock to pay additional Federal taxes aggregating some $770,000,000.

Apart from the enormity of the tax burden, it is of utmost importance to note that it would not be an ordinary tax burden but a most extraordinary and anomalous one. Although the distributions would be treated as constituting income for tax purposes, economically they would represent merely a change in the form of a capital asset, *i.e.*, the division of each stockholder's investment in du Pont into its two component parts. This division would not add to the earning capacity or asset value of the investment, but each

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[1] The taxes are "additional" on the assumption that du Pont would continue substantially its historic cash dividend policy. This appears to be the only realistic assumption, see *infra*, pp. 63-4.

non-corporate stockholder would be required to pay the tax merely to retain the same assets and earning capacity that he reasonably thought he was buying originally. In other words, the taxes would not be paid out of income or gain; they would be paid out of capital and would be a form of capital levy (Murray, R. 787; Shanks, R. 817-8; Jacoby, R. 1719-20; Kennedy, R. 2175).

This may be demonstrated by considering each du Pont share as comprised of (a) a direct interest in du Pont's chemical operations and (b) an indirect investment in General Motors. Both are now represented by a single stock certificate, but after the proposed distribution they would be represented by separate certificates. As a result of the separation into two parts, however, each non-corporate stockholder would pay a Federal tax ranging from 16% to 87% of the value of the distributed stock, or *from 5% to 25% of the total value of his du Pont stock.*[2] He would own no more than before but would have to pay this levy in order to retain the same interests as before.

Superficially, it might seem that payment of an income tax on the receipt of the General Motors stock would be no more burdensome than in the case of an equal amount of cash dividends, but this overlooks the basic economic distinction between the two types of distribution. The re-

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[2] The Government seeks to minimize the importance of the tax impact by pointing out that the average impact on individuals holding one to 100 shares would be relatively low (Br. 20, n. 18). But the District Court was bound to consider the impact on larger as well as smaller stockholders, and the record indicates that the weighted average tax rate of non-corporate du Pont stockholders would be 57.2% (DPX 25; R. 1376, not printed). In terms of du Pont stock, this would mean an average levy on non-corporate stockholders of approximately 16.5% of total value (57.2% x $55 ÷ $190—16.5%).

cipient of an ordinary cash dividend retains the same earning capacity and the same full market value of his investment *plus* the net dividend after tax, but the recipient of an equal value in General Motors shares would find his investment reduced by the amount of the tax. The recipient of the cash dividend would be receiving the fruit of the tree, while the recipient of the General Motors dividend would be receiving part of the tree itself.

The Government's brief quite misses the point when it brushes aside the difference between a forced transaction and a voluntary transaction in these circumstances (Br. 27, 60). Because of the tax impact, no corporate management would *voluntarily* effectuate a non-cash distribution taxable to stockholders without weighing the tax consequences—indeed, if it failed to weigh the tax consequences and improvidently subjected stockholders to a 5% to 25% capital levy,[3] it would be open to severest criticism and possible liability. A court of equity would also be derelict in discharging its responsibilities if, with another effective remedy available, it brought about a harsh and anomalous tax result that would otherwise never occur.

In addition to this very extraordinary Federal tax on non-corporate du Pont stockholders, there are other taxes that would have to be borne by the same or other stockholders:

(1) Many stockholders would be required to pay state income taxes, at rates ranging from 1% to more than 12% (DX 54; R. 2229, 3058A-C). The state taxes would amount to an additional levy ranging upward to as much as 3%, with the result that total Federal and state taxes would amount to a levy of from 5% to 28% of value.

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[3] Including state taxes applicable to some stockholders, the levy could be as high as 28%, as shown *infra*.

(2) There would also be a Federal tax impact on certain other stockholders who were not included in the survey mentioned above. Although such tax would be small in the case of domestic corporations, it would be substantial for certain special classes of stockholders (Tepping, R. 1324-6, 1351-2, 1374; ADX 2, R. 1313, 3177-8).

(3) Christiana and Delaware would have to pay substantial capital gains taxes in connection with the proposed sales of General Motors shares. Christiana has many public stockholders and its stock has been a favorite investment of many educational and charitable institutions (see GX 70, R. 566, 2682; GX 71, R. 566, 2683; CX 20, R. 2403, not printed). These institutions, along with other stockholders, would stand to lose a considerable portion of their income and underlying asset value as a result of these capital gains taxes (CX 6, R. 1555, 3084A; CX 9, R. 1558, 3085).

The District Court made detailed findings as to all these tax impacts (R. 3203-11, 3262-3) and characterized them vividly (Govt. Br. 20) but quite accurately. The Government seeks to avoid the problem by arguing that oppressive tax impacts are not a pertinent factor to be considered,[4] citing *Veazie Bank* v. *Fenno*, 8 Wall. 533 (1869), and cases following. But in each of the cited cases the issue was the constitutionality of a tax, and this Court merely held that Federal courts could not declare a tax unconstitutional because they regarded it as oppressive.[5] This is a far cry

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[4] Alternatively, the Government seems to admit the pertinency of the problem by suggesting that it may be minimized by alterations of the plan; this aspect is discussed in C *infra*.

[5] The sentence in the *Veazie Bank* opinion immediately following the language quoted by the Government makes this clear: "So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution" (8 Wall. at 548).

from holding, as the Government contends, that the impact of taxes is not a relevant *fact* to be considered, along with all other relevant facts, in determining whether a particular decree is equitable and appropriate.

After all, Congress has not determined to use the Federal income tax laws as a means of enforcing the antitrust laws, or the latter as a means of collecting taxes. This very point arose in *United States* v. *Minnesota Mining & Mfg. Co.*, 96 F. Supp. 356, 357-8 (D.Mass., 1951), and the court (Wyzanski, J.) disposed of it as follows:

> There is nothing in the revenue laws or their policy that would require Minnesota to become subject to that burden at once. * * * Acceleration of the capital gains tax does not serve any strictly revenue purpose.
>
> However, the argument is advanced by the Government that the anti-trust laws do contemplate exactly such acceleration. * * *
>
> The difficulty that I find in this argument is that there is no specific requirement of any anti-trust statute, or, indeed, of any case familiar to the Court, that dissolution and divestiture must always occur. The Court may withhold its hand in connection with dissolution in those cases where the anti-trust advantages are not sufficiently compelling to outweigh other disadvantages. * * * No one would argue that to run a company into a tax liability not thought necessary under the revenue laws serves an anti-trust purpose. The only time Congress has imposed any consequence as harsh as that, * * * the Courts have sedulously refrained from applying the legislative sanction.

Similarly, the Court below, in taking the tax impact into account, was merely discharging the time-honored duty of an equity court to exercise its injunctive powers "upon conditions that will protect all—including the public—whose interests the injunction may affect." *Inland Steel Co.* v. *United States*, 306 U.S. 153, 157 (1939).

As a matter of fact, until the filing of its brief on this appeal, the Government itself appeared to recognize that the impact of taxes may be a relevant and material factor. Thus, the Government at no time urged the District Court to disregard taxes; on the contrary, it recognized at various times and in various ways the relevance of what counsel described as this "very important area" (R. 2441). Indeed, the Government called its own witness to suggest ways (of dubious merit, as it turned out, R. 2464-86) in which the tax liability could be avoided (R. 2441). Moreover, in testimony supporting remedial tax legislation, Assistant Attorney General Bicks expressly recognized that the tax consequences flowing from divestiture are an appropriate consideration in the framing of an equity decree (*Hearings on S. 200 before the Senate Committee on Finance*, 86th Cong., 1st Sess., 322 (1959)). In the same connection he also testified:

> Indeed, there is real basis for concluding that some benchmark antitrust divestiture cases * * * might well not have been decreed had today's tax rates prevailed.[4] [*Hearings on H.R. 8126 before the House Committee on Ways and Means*, 86th Cong., 1st Sess., 18, 25-6 (1959).]

B. Market Impacts of Government's Original Plan on du Pont and General Motors Stockholders

1. Market impact on du Pont stock.

The record shows indisputably that the threatened tax impact would cause a great many du Pont stockholders to sell their shares rather than receive General Motors stock

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[4] The cases listed by Mr. Bicks included *United States* v. *Northern Securities Co.*, 193 U.S. 197 (1904); *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911); *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911); *United States* v. *E. I. du Pont de Nemours & Co.*, 188 Fed. 127 (D. Del., 1911); *United States* v. *Union Pacific Railroad Co.*, 226 U.S. 470 (1913).

in a taxable distribution, and that a large number of du Pont shares would also be sold by trustees who would want to avoid the same tax impact, or the problem of being forced to invade the principal of a trust in favor of the income beneficiary, or merely to avoid the risk of litigation (Christensen, R. 1416; Orndorff, R. 1475-8; Emerson, R. 1527-32; Jacoby, R. 1711-5; Lowell, R. 1937-9; Moses, R. 2011-12; Lenz, R. 2086-8; Kennedy, R. 2176-9). Moreover, these sales would tend to occur immediately and more or less concurrently, and would inevitably be accompanied by a drying up of demand because any non-corporate investor would be "buying into" the same tax burden that would motivate an existing holder to sell (Orndorff, R. 1478; Emerson, R. 1534-5; Lenz, R. 2089; Kennedy, R. 2180).

In view of this extraordinary pressure on the selling side and deterrence on the buying side, expert witnesses testified that between 2,500,000 and 4,000,000 du Pont shares would be sold upon adoption of the plan (Emerson, R. 1533; Lenz, R. 2087), and that a market decline of 25% to 30% could be expected to ensue (Emerson, R. 1536; Lenz, R. 2088).

This evidence, and the related findings of the District Court (R. 3247, 3263), are uncontradicted in the record. The Government presented voluminous evidence with respect to the market impact on General Motors stock (see B-2 *infra*) but none with respect to the quite separate impact resulting from selling pressure on du Pont stock. The indicated huge losses to du Pont stockholders would thus seem to be admitted.

In addition to the foregoing, since General Motors stock is a substantial component of du Pont stock, any decline in

market value of the former would necessarily be reflected in reduced market value of the latter. This impact is discussed in the next section.

2. Market impact on General Motors stock.

The voluminous evidence as to market impact on General Motors stock occupied the major portion of the hearings before the District Court. After carefully reviewing this evidence (R. 3212-34), the Court was "persuaded beyond any doubt that a judgment of the kind proposed by the Government would have very serious adverse consequences." (R. 3247; also see R. 3263.)

This finding is amply supported, even compelled, by the record. The increase in suppl in General Motors stock would be of an unprecedented nature—indeed, there has been no comparable situation in the investment banking history of the United States (Friend, R. 1051; Emerson, R. 1485, 1525; Lenz, R. 2066; Forgan, R. 2237). This increase in supply would res lt, in the first instance, from the trustee's sale of some 20,000,000 shares in ten annual installments. Each annual sale of 2,000,000 shares, having a present value of approximately $80,000,000, would by itself be one of the largest distributions of common stock ever made (Emerson, R. 1497; Moses, R. 2006; Lenz, R. 2066), and each except the last would be affected by the "overhang" of others to come (Boulton, R. 537-9; Beacom, R. 1651-2; Herd, R 1839-40; Lenz, R. 2067; Emerson, R. 1508, 1517). Additional increases in supply would result from disorganized selling by stockholders, which would be going on at the same time as, and in competition with, the trustee's

sales. Many du Pont stockholders would sell the distributed General Motors shares in order to raise cash for income taxes[7] or other needs (Emerson, R. 1485-91; Beacom, R. 1653; Jacoby, R. 1732-4; Moses, R. 2007-8; Lenz, R. 2073-5; Kennedy, R. 2176; Forgan, R. 2233-4); and many General Motors stockholders would sell on the advice of brokers that General Motors is likely to sell at depressed prices for ten or more years (Lenz, R. 2076-7, 2080-1, 2164-5; Forgan, R. 2234).

On the other side of the market, entry of the divestiture judgment proposed to the District Court would not stimulate any new demand, but would tend to cause a shrinking of demand. There is no latent, unsatisfied demand for General Motors stock (Emerson, R. 1517-8; Jacoby, R. 1735-7; Moses, R. 2007), and it has been freely available for purchase by anyone. There is very substantial evidence that General Motors stock would lose its "blue-chip luster" (Herd, R. 1840), would not be recommended for purchase by small investors at previously prevailing prices (Lenz, R. 2077, 2080-1), and would be bought by financial institutions, if at all, only at substantially reduced prices (Caley, R. 1801-3; Herd, R. 1841, 1843-4; Kunhardt, R. 1896-7; Lowell, R. 1941, 1949; Moses, R. 2001-2, 2004-6; Kennedy, R. 2174).

These inherent problems of the Government's proposed divestiture judgment were analyzed by defendants' witnesses having "wide experience and great responsibility

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[7] As already noted in A of this Point IV, the Federal income taxes alone would amount to at least 16% to 87% of the market value of the distributed shares.

for investing funds and marketing securities" (R. 3263).[8] Their testimony was unanimously to the effect that there would be a substantial depression in price of General Motors. The degree of the impact was estimated variously by the different witnesses, but the estimates were mostly in the range of 15% to 30% (Emerson, 20% to 25%, R. 1525; Beacom, 15% minimum, R. 1653; Jacoby, 10% to 20%, R. 1738; Lenz, 20% to 30%, R. 2084; Forgan, 30%, R. 2238-9), equivalent to a reduction of approximately $1,700,000,000 to $3,400,000,000 in present market values. Moreover, this depression would last throughout the ten-year period of divestiture (Emerson, R. 1525, 1568; Jacoby, R. 1731, 1738; Kennedy, R. 2172; Boulton, R. 539).

On the other hand, the opinion testimony on behalf of the Government was presented by witnesses who had no actual experience in handling large-volume sales or purchases of

[8] The witnesses who testified that there would be a serious adverse impact on the price of General Motors were (1) underwriters having responsibility for large-scale securities distributions (including prior distributions of General Motors stock): Sumner B. Emerson (Morgan Stanley & Co.), Winthrop C. Lenz (Merrill Lynch, Pierce, Fenner & Smith) and James R. Forgan (Glore, Forgan & Co.); (2) administrators of large trust institutions: Ralph Lowell (Boston Safe Deposit and Trust Company), David M. Kennedy (Continental Illinois National Bank and Trust Company of Chicago) and Thomas H. Beacom (The First National Bank of Chicago); (3) administrators of insurance company investment portfolios: Ralph Lowell (John Hancock Mutual Life Insurance Company), Charles F. Caley, Jr. (Aetna Life Insurance Company and affiliated companies) and John V. Herd (America Fore Insurance Group); (4) an investment company administrator: William B. Moses, Jr. (Massachusetts Investors Trust); (5) a pension trust administrator: Kingsley Kunhardt (Guaranty Trust Company of New York); and (6) an eminent economist: Dr. Neil H. Jacoby (Dean of the Graduate School of Business Administration of the University of California and a former member of the President's Council of Economic Advisors).

securities (Friend, R. 990; Boni, R. 962-4, 1266-73; Howell, R. 2517-20), and who therefore relied largely on statistical or theoretical data. The testimony of two of the witnesses was found by the District Court to be unpersuasive and unreliable, for reasons stated in the opinion (R. 3218). Dr. Friend, the only one of the Government's witnesses referred to in its brief (Br. 14, 75, 78), expressed his conclusions in terms of the *average* impact of certain past offerings (R. 987, 1015-6, 1020); he expressed no opinion as to the potential impact of the Government proposal except on a hypothetical and incomplete basis, and then only by reference to his averages (R. 1015-6, 1020, 1032-3); yet he recognized that stock offerings under that proposal would be unprecedented and not average (R. 1051). As the District Court concluded, the type of evidence introduced by the Government could not overcome the weight of the testimony adduced by defendants (R. 3216, 3218, 3221-2, 3263). In any event, the Government's witnesses did not disagree that there would be a market impact—their difference with defendants' witnesses related solely to the amount and duration of that impact—so that even on the Government's evidence itself the Court found that there would be a "serious risk" of market depression and substantial losses to stockholders (R. 3263).

The opinion of the District Court shows that its findings were based not only on thorough and careful analysis of the objective data in the exhibits but also on the Court's evaluation of the demeanor, integrity, and ability of the expert witnesses (R. 3212-34). The Government does not directly attack these findings as applied to its original proposal, but urges, in effect, that the District Court gave too much weight to them and that they would not be applicable to the different type of decree now proposed on this appeal

(Br. 59, 62 *et seq.*).[9] With respect to the original proposal, the District Court's conclusion that it would have a serious impact on the market value of General Motors stock is fully supported by the record and stands essentially unchallenged.

From the point of view of General Motors stockholders, the potential market losses would be especially unjust. The more than 700,000 General Motors stockholders[10] have nothing to do with du Pont and they are innocent bystanders to the events which caused these proceedings. Yet they stand to bear a large share of the brunt of a divestiture decree. The District Court quite properly refused to speculate with the property of these stockholders, as the Government would have had it do.

3. The Government's comments as to the significance of market impacts.

Although the Government expressly admits that "such foreseeable effects of a plan of divestiture [*i.e.*, "the threatened disruption of the market for du Pont and General Motors stocks"] are a proper consideration for a court in framing a decree" (Br. 62), it nevertheless argues that a court is limited to encouraging "orderly" distribution and "cannot speculate as to intermediate short-range market fluctuations" because "History has proved that large scale

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[9] These aspects are discussed in B-3 and C, *infra*.

[10] This is the approximate number of record owners and is only a partial indication of the total public that would be affected. The 700,000 record stockholders include many thousands of trusts, estates and custodians for minors; several thousands of religious organizations, hospitals, libraries, museums, and educational institutions; several hundred employee benefit funds; several hundred insurance companies; and several hundred other organizations having large memberships (GMX 17, R. 1976, 3119). Of the more than 700,000 record holders, some 560,000, or approximately 78%, are each owners of less than 200 shares (GX 149, R. 750, 2707).

forced distributions can be carried out without financial loss to investors * * *" (Br. 62-3). None of these assertions will stand analysis.

First of all, the District Court would be powerless to produce an "orderly" result where stockholders of both companies would be rushing to sell in order to avoid the worse consequences of holding. Even apart from this, if the Government means to say that it is immaterial how severe the losses may be, so long as the process is orderly, this position is contradicted by the cases.[11] Even in *Continental Insurance Co.* v. *United States*, 259 U.S. 156 (1922) a case heavily relied on by the Government (Br. 49-50, 52-3), the Court considered potential market losses of investors:

> The considerations influencing the District Court and the Government against a drastic readjustment of the interests of the bondholders under the general mortgage and the holdings of the two offending companies were of manifest weight in the then business and monetary situation. *Even now this court would hesitate to order a sale of this kind of property worth probably one hundred million dollars with confident hope of realizing an adequate amount with the necessary restrictions as to the purchaser. We agree with the Attorney General in his disinclination to insist upon such a sale under the circumstances.* Since the time of

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[11] In *United States* v. *American Tobacco Company*, 221 U.S. 106, 187 (1911), the Court did not resort to a particular remedy because the remedy, although appropriate in all other respects, would "not only do grievous injury to the public, but also cause widespread and perhaps irreparable loss to many innocent people." In *Harriman* v. *Northern Securities Co.*, 197 U.S. 244, 299 (1905), the Court alluded to the fact that divestiture was wisely accomplished by distribution [which at that time was without tax consequences] rather than sale "for the forced sale of several hundred millions of stock would have manifestly involved disastrous results."

> settling the decree, however, a change for the better has come in the financial situation. We think that this justifies us now in making some modifications [consisting of departures from mortgage and bond provisions] in the plan which were not presented to the parties or considered by the court, possibly because they might have been unwise in the critical conditions then existing. [259 U.S. at 170; emphasis supplied.]

In its emphasis on "short-range market fluctuations," the Government is choosing to overlook, as the District Court did not overlook (R. 3221), that the losses resulting from forced sales by stockholders in a depressed market would be just as severe and permanent whether the depression were "short-range" or permanent. A short-range dislocation may be unimportant for a stockholder in a position to hold indefinitely, but the Government disregards the plight of those stockholders who would be forced to sell immediately and before the long-term recovery that the Government assumes. The loss to such stockholders would be severe, permanent and irreplacable.[12]

Nor does "history" of other divestitures vindicate the Government's proposal. History cannot be expected to repeat itself, for the problem here is unique. As noted above, the downward pressures on the market prices of du Pont and General Motors would result in large part from the harsh tax impacts. As further noted (*supra*, p. 36), there was no comparable problem under the Public Utility Holding Company Act, since the distributions under that Act were tax-free. For this reason, among others, the Government's indirect reference (Br. 63-4) to the "regeneration"

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[12] Of course, the assumption that there would be only "short-range" fluctuations is itself contradicted by the record (Boulton, R. 539; Emerson, R. 1525, 1568; Jacoby, R. 1731, 1738; Kennedy, R. 2172).

of the utility industry is wholly irrelevant.[13] Likewise, the judgment entered in *United States* v. *Aluminum Company of America*, cited at Govt. Br. 63, is beside the point, as that judgment did not require a taxable distribution to the general body of stockholders.[14]

C. The Government's New Suggestions are Untimely and Inappropriate and, In Any Event, Would Not Alleviate the Burdens of Divestiture

The District Court made clear at the outset (R. 4), and consistently thereafter, that the proceedings on relief were to be as broad as the mandate itself; certainly the Court did not *exclude* the Government's objective of divestiture, or any particular mode of divestiture, from the range of possibilities to be considered. Thus, the Government had unlimited opportunity to show that some particular kind of divestiture order—not "divestiture" in the abstract—would be feasible, equitable and appropriate in the circumstances.

In addition to such *opportunity*, the Government certainly had an *obligation*, having consistently urged that divestiture is mandatory, to make an affirmative showing of

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[13] That regeneration resulted from many measures and techniques (eliminating inflated accounts, unbalanced capital structures, servicing abuses, etc.) other than divestitures. Moreover, the major divestitures very often took the form of pro rata distributions rather than sales (see, *e.g.*, Blair-Smith & Helfenstein, *A Death Sentence or a New Lease on Life?*, 94 U. of Penn. L. Rev. 148, 172); none of the divestitures taking the form of sales approached in magnitude what would be required here (see, *e.g.*, *Tenth Annual Report of the Securities and Exchange Commission*, Table 17, pp. 247-67); and, above all, all forms of divestiture were free of hurtful tax consequences to the corporations or their security holders. As to the importance of the latter consideration, see also *infra*, p. 70, n. 2.

[14] The record also shows that the stock of Aluminium, Ltd. fared less well than other aluminum stocks during the divestiture period (DX 47, R. 2226, 3052B; Lenz, R. 2069-70; Friend, R. 1041-2).

the need for divestiture and of the fairness and feasibility of some particular plan of divestiture. "Thus, courts as a rule have refused divestiture in the absence of some clear showing of its necessity to insure effective competition, its practicality and, in light of surrounding circumstances, its basic fairness." *Report, Attorney General's National Committee to Study the Antitrust Laws*, 354 (1955). As one distinguished trial judge has stated (Wyzanski, J., in *United States* v. *United Shoe Machinery Corp.*, 110 F.Supp. 295, 348 (D.Mass., 1953), *affirmed per curiam* 347 U.S. 521 (1954)):

> A petition for dissolution should reflect greater attention to practical problems and should involve supporting economic data and prophesies such as are presented in corporate reorganization and public utility dissolution cases. Moreover, the petition should involve a more formal commitment by the Attorney General, than is involved in the divergent proposals that his assistants have made in briefs and in oral arguments addressed to the Court.[15]

But, in availing itself of its opportunity and discharging its obligation, the Government—while occasionally paying lip-service to the idea that any feasible and equitable mode of divestiture would be acceptable—adhered inflexibly to its single plan as filed at the outset of the proceedings.[16] The

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[15] See also *United States* v. *General Electric Co.*, 115 F.Supp. 835, 871 (D.N.J., 1953).

[16] See the colloquy at R. 2290-92 and particularly the following:

> Mr. Reycraft: • • • I might also add that it is rather an obvious thought that the judgment which we did file was approved by not only the Assistant Attorney General but the Attorney General, and that while I am authorized here to represent the Government, I have no authority to change the decisions they make.
>
> The Court: It is my understanding then that you are standing on the decree that you proposed before this hearing started?
>
> Mr. Reycraft: That is right, sir. [R. 2292.]

Government did not at any time indicate that the "take-down" plan described in the next paragraph would be acceptable (*cf.* R. 2462-3) or that the new suggestions advanced in its brief on this appeal might be substituted. Indeed, the Government declined even to support certain suggestions of its own rebuttal witness as to possible means of alleviating the tax burdens of its plan (R. 2459-62).

On the other hand, the other parties and the District Court did not confine themselves within this self-imposed limitation of the Government. As stated in the Introductory Statement the undersigned conceived it their duty, as *amici curiae* in the District Court, to explore all possible modes of divestiture, and *amicus* Dallstream did in fact suggest for consideration of the Court, as the most promising possibility if divestiture were deemed necessary, the so-called "take-down" plan.[17] The District Court concluded that, apart from the unresolved tax problems and complications referred to in the footnote, the plan was not necessary to accomplish effective relief, in which conclusion the undersigned fully concur. However, the significance of this episode goes beyond the merits of the particular plan; the point is that the failure to arrive at an effective, feasible and equitable alternative plan of divestiture in the proceedings below was not for lack of seeking.

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[17] This plan, which is discussed by the District Court at R. 3190-2, would have resulted in a substantial separation of the presently combined ownership of du Pont and General Motors equities, but only to the extent that voluntary exchanges would have been encouraged by the absence of harsh tax consequences. The plan was suggested for consideration subject to obtaining a favorable tax ruling, but when the ruling issued (after entry of the judgment) it contained features which cast doubt on the feasibility and equity of the plan. Apart from the tax question, the plan would have involved certain complications, referred to by the District Court at R. 3260-1, and in any event the Government never indicated that it would accept the plan as an appropriate mode of divestiture.

In addition to the "take-down" plan, considerable testimony was elicited as to possible modifications of the Government's plan (*e.g.*, Emerson, R. 1537-45, 1549; Jacoby, R. 1739; Caley, R. 1806-8; Lowell, R. 1943-4; Lenz, R. 2084-6, 2091); and the District Court expressly considered "whether there might be modifications of the Government's plan or other forms of divestiture of the legal title which might reduce or mitigate these adverse consequences" and expressly found that there was no such other plan that would not either unduly impair property values or impose severe tax consequences upon du Pont stockholders (R. 3248-9).

The Government, choosing now to read the District Court's findings as if narrowly confined to the one plan advocated by it below (Br. 27-8, 59, 64), virtually abandons that plan on this appeal (Br. 28, 59, 65, 78-9, 81). Instead, there is a wholly new emphasis on latitude and freedom of action on the part of du Pont (Br. 65-6, 78-80) and there are wholly new—or what purport to be new—suggestions as to appropriate modes of divestiture (Br. 66-79).

There is considerable doubt as to the propriety of the Government's thus shifting its position at this time. Having had unlimited opportunity before the District Court, the Government failed to propose or substantiate any plan of divestiture that it is now willing to stand by. The Government was presumably confident of the feasibility and equity of its original plan, but the evidence exposed vast and varied problems which it apparently had not envisaged. Yet, it now seeks to persuade this Court, solely on counsel's assurances, that other modes of divestiture are readily available.

Even apart from the doubt expressed in the preceding paragraph, it is difficult, from the point of view of du Pont or General Motors stockholders, to find any comfort

in the Government's new emphasis on giving latitude and freedom of action to du Pont. Unless the underlying problems can be obviated, it will not make much difference to stockholders whether a particular evil is directly imposed by mandate or is chosen by du Pont from among several evils. The trouble is that neither in the hearing nor—as will be shown below—in the Government's brief on appeal has there been any showing of a way to avoid serious loss and hardship to stockholders.[18]

Furthermore, even if each separate program were free of problems, the Government seems much too cavalier in assuming the practicality of intermingling a number of different programs. Each of the types of program suggested by the Government (exchange offers, distribution and sales) would itself be complicated and time-consuming to plan and to effectuate, and the pendency or prospect of any one of them would become a complicating factor with respect to any other. For example, du Pont's current and prospective dividend policy—whether in cash or shares or a combination—would have obvious bearing on the attractiveness of an exchange offer; both the dividend policy and the pendency or prospect of an exchange offer would have bearing on the feasibility of a direct sale of General Motors shares in the market; and to complete the circle, it would

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[18] Typical of the Government's reliance on du Pont's freedom of choice as a nostrum for all ills, and the futility of such reliance from the viewpoint of stockholders, are its statements (a) that the evidence pertaining to the adverse effects of stock distributions has little application "under a judgment giving du Pont freedom . . . to divest or not divest by this means" (Br. 69), and (b) that du Pont, to the extent that it might choose to divest General Motors stock by means of sale, could sell without appreciable or significant effect on the market price of General Motors stock" (Br. 72-3). The question the Government never realistically answers is how it would be possible for du Pont to "choose" not to distribute *and* not to sell except in insignificant quantities.

be all the more difficult to arrange an intelligent and intelligible dividend policy with other types of programs in operation or in prospect.

With respect to the specific suggestions in the Government's brief, closer analysis reveals that they either involve the same problems that were considered by the District Court or else present new problems which counsel have apparently overlooked:

(1) The first is a wholly new suggestion (Govt. Br. 66-7) that du Pont might offer to exchange General Motors stock for its own outstanding preferred and common stock. The record contains no factual evidence or opinion testimony as to such offers; hence there is nothing to support counsel's assertions and assumptions about them. That the assertions and assumptions are unduly optimistic and unrealistic is readily demonstrable.

First, it is highly problematical whether any significant portion of the stock would actually be divested in this manner. If the offers were made substantially at prevailing market levels, there would be little incentive for a holder of either preferred stock or common stock to make the exchange—especially if he would be required to pay at least a capital gains tax for the privilege and would not receive any cash with which to pay the tax. Being an investor in du Pont stock, preferred or common, does not automatically make one eager to purchase General Motors stock instead; and if eager, there is ample opportunity to sell and purchase in existing markets with the same tax consequences that the Government assumes. Consequently, if a significant quantity of stock is to be divested in exchange offers, it would seem essential for these offers to be made at bargain levels, but this in turn would amount to giving away corporate assets at the expense of stockholders

who were unable to exchange, not to mention that it would obviously tend to depress the market price of General Motors stock.[19]

This doubt as to the quantity of stock that might actually be divested through exchanges is increased by the doubt which necessarily exists as to the tax consequences to du Pont itself and to its stockholders of such exchanges. The Government's assertions that du Pont would pay no tax and that du Pont stockholders would be taxable on a capital gains basis (Br. 66) seem, at the very least, to be quite dubious. The Government cites § 311(a) of the Internal Revenue Code for the proposition that du Pont would pay no tax on the exchange, but the Regulations seem to indicate that § 311 would not apply to distributions where the corporation receives its own stock as consideration for the sale of property by it—*i.e.*, where the motivation is disposition of property as distinguished from shrinkage of capital. Treas. Reg. § 1.311-1(a) and (e).

With respect to the tax impact on stockholders, redemptions by a corporation of its own stock are treated as distributions taxable at ordinary income rates unless they fall within one of four exceptions: (1) redemptions not essentially equivalent to a dividend, (2) redemptions in which

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[19] This is one of many places (see *supra*, p. 24) where the sheer quantity of stock involved—both absolutely and relatively—becomes a significant limiting factor. The market value of du Pont's holding of General Motors is currently about $2,500,000,000, and, even more important, constitutes more than one-fourth of the market value of du Pont stock. Thus the practicalities are completely different from the situation where a small quantity and percentage of stock is redeemed in exchange for a small quantity and percentage of assets. Essentially the same comment is applicable to distributions, sales and other means of divestiture theoretically available.

the percentage of all voting stock of the corporation held by the stockholder-taxpayer (including stock constructively owned under applicable attribution rules) is reduced to less than 80% of such percentage immediately before the redemption, (3) redemptions of all of the stock owned by the stockholder-taxpayer (including attributed stock), and (4) certain redemptions by railroad corporations. Int. Rev. Code of 1954, §§ 302(b), (c) and (d). Taking these in reverse order, (4) is obviously unavailable. As to (3), it cannot be assumed that any significant number of du Pont stockholders would desire to relinquish their *entire* interest simply to acquire General Motors shares, unless on a superbargain basis, and even then each exchanging stockholder would have to assure himself that all stock constructively owned under the attribution rules would also be redeemed, and that du Pont would accept the entire tender.[20] As to (2), no stockholder would be in a position to determine whether his redemption (including the redemption of attributed stock) would meet the mathematical test of the statute, since the amount of du Pont stock outstanding after the redemption would depend on the quantity of redemptions by other stockholders. This leaves, as a practical matter, only exception (1) on which the Government's assertion must rest, and such reliance seems extremely questionable. Certainly no common stockholder could be confident of the tax result unless du Pont had received a favorable ruling from the Commissioner of Internal Revenue in advance, and it is open to question whether the Commissioner would be willing to issue any ruling in the circum-

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[20] Assuming sufficiently favorable offering terms to attract a large quantity of tenders, du Pont might have to accept on a pro rata basis or else deal inequitably as among its stockholders.

stances[21] and even more open to question that a ruling would be favorable.[22]

Finally, even if the Government's assumption regarding taxes were correct, this particular suggestion would not necessarily alleviate the burdens of forced sales and distributions. Since du Pont would be required to divest itself of a specified number of shares each year, and since the success of exchange offers would depend on voluntary action by du Pont stockholders, du Pont would have to turn to sales or distributions, well before the end of each year,

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[21] The Commissioner of Internal Revenue has indicated that rulings will not be issued with respect to prospective transactions where the determination is primarily one of fact. Rev. Rul. 54-172, 1954-1 C.B. 394, 398; *Statement of Procedural Rules*, §601.201(e), 20 Fed. Reg. 4630. The question whether a distribution in redemption of stock qualifies under exception (1) depends upon the facts and circumstances of each case (Treas. Reg. §1.302-2(b)), and the applicability of the exception is determined as to each shareholder-taxpayer upon the facts pertaining to such shareholder-taxpayer, including the constructive stock ownership of the stockholder-taxpayer (see *Sen. Rept. No. 1622*, 83d Cong., 2d Sess., p. 49, where it is stated that for section 302 purposes distributions "would be subjected, at the shareholder level, to the separate tests * * *"). Thus, it would not seem that the Commissioner would give an advance blanket ruling in a form upon which individual stockholders could safely rely.

[22] There are various indications that exception (1) is to be narrowly and strictly applied, certainly not as a broad escape from the strict tests of exceptions (2) and (3). The Senate Report on the Internal Revenue Code of 1954 *(Sen. Rept. No. 1622*, 83rd Cong., 2nd Sess., pp. 44-5) suggests a modest role for exception (1) in its explanation of the reason for adding it to the House bill. The only example of a qualifying redemption given in the Regulations (Treas. Reg. §1.302-2(a)) is a redemption of one-half of the non-voting preferred stock of a shareholder owning no shares of any other class. Of seven published rulings relating to exception (1), three were adverse (Rev. Rul. 56-182, 1956-1 C.B. 157; Rev. Rul. 57-353, 1957-2 C.B. 223; and Rev. Rul. 59-258, 1959-2 C.B. 105), three of the remaining ones involved redemptions of preferred stock (Rev. Rul. 55-462, 1955-2 C.B. 221; Rev. Rul. 56-485, 1956-2 C.B. 176; and Rev. Rul. 56-540, 1956-2 C.B. 177) and the fourth involved very special facts completely different from the present ones (Rev. Rul. 56-183, 1956-1 C.B. 161).

in order to be certain of disposing of the required number of shares.

(2) The Government's second suggestion—distributions partly in lieu of cash dividends (Br. 67-70)—is not really new, and the record amply demonstrates that such a program would not eliminate harsh tax and market burdens; indeed, there was considerable evidence showing that such a dividend policy would be more harmful than helpful (Emerson, R. 1537-43; Jacoby, R. 1715-9; Caley, R. 1806-7; Lowell, R. 1941-2, 1944, 1949-51; Moses, R. 2010-5; Lenz, R. 2085-6, 2090-1),[23] because it would produce hardships on stockholders needing cash dividends to pay income taxes and/or for regular living expenses, and thus would undoubtedly cause even greater pressure on the market than if the distributions were in addition to regular cash dividends. Further, the retained cash would either remain uninvested and unproductive,[24] in which case the distribu-

[23] The Government seeks to belittle this evidence by calling it "vague," "*pro forma*" and "unpersuasive" (Br. 69), and by asserting that it applies only to the original Government proposal. However, the evidence, consisting of the testimony of an eminent economist, two leading investment bankers, and three persons having wide experience in the purchase of securities for institutional investors, was uncontradicted and was expressly relied on by the District Court (R. 3224, 3228, 3233, 3247-8); it cannot be rebutted on appeal simply by counsel's argument. Moreover, it related to possible modifications of the Government's original plan along the lines here discussed.

[24] The record indicates that du Pont does not expect to raise capital from outside sources for at least ten years and that all funds needed for expansion of its present chemical business are expected to be provided by depreciation accruals and retained earnings, after payment of annual dividends at the 1958 rate of $6 per share (R. 1916-19). Thus if distributions of General Motors stock were wholly in lieu of cash dividends at this rate, the retained excess cash would be in the order of $274,000,000 per year; if in lieu of part of the cash dividends, the retained excess cash would be in proportion (DX 39; R. 1925, 3046A). Apart from the impact on stockholders of the needless accumulation of unproductive cash, can it be assumed that du Pont would have the "choice" to withhold such quantities of earnings? See Int. Rev. Code of 1954, §531.

tion of General Motors shares, though taxed as earnings, would simply represent a progressive reduction of earning capacity[25]; or else it must be invested in new enterprises to generate equivalent earnings, in which case wholly new problems of public import would undoubtedly arise (Jacoby, R. 1718-9; Pippin, R. 1921-2).[26]

The Government emphasizes (Br. 68) that du Pont would have complete control over its cash dividend policy. This was also theoretically true under its original plan, but practically there would be precious little freedom of choice under either program. Hence, it is simply ignoring reality to say that "any additional taxes payable by its stockholders would be the product of du Pont's own action and not of the antitrust judgment" (*ibid.*).

The Government makes the more particularized suggestion that each year one General Motors share could be paid for each 40 shares of du Pont, which would be equivalent to about $1.00 per du Pont share in the form of stock and the balance of the dividend in cash (*ibid.*). On this basis (and assuming that the outstanding du Pont common were not being progressively reduced by exchange offers), complete divestiture would require over 50 years as com-

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[25] Thus, the tax impacts discussed under Point IV-A would not be alleviated, they would merely be disguised.

[26] The Treasurer of du Pont estimated that the total to be invested, if distributions were wholly in lieu of cash dividends, could be as much as $2,835,000,000, or nearly double the amount of assets of Massachusetts Investors Trust, the largest investment trust in the country (Pippin, R. 1920-2). This aspect was discussed in the District Court's opinion at R. 3248, and the Court commented that "it should not use its equitable powers in a way that seems certain to enhance the power and position of the du Pont Company and perhaps create new antitrust problems * * *."

pared with the 10 years provided in the Government's plan and also suggested at page 28 of its brief. Hence, such a program would meet less than one-fifth of the Government's objective and leave four-fifths to be accomplished in other ways. And as to the one-fifth, all the problems mentioned above would still exist, although in lesser quantity. In sum, this particular suggestion is but a specific example of a broad approach that the District Court considered and found wanting (R. 3247-8).

(3) Another purportedly new suggestion (Govt. Br. 70-8) is the direct sale by du Pont of General Motors stock. Although du Pont stockholders would have no direct tax liability on such sale, the indirect effect of the capital gains tax payable by du Pont would still be extremely harsh. As the Government points out, the average tax would be $10 per share assuming a market price in the low 40's, so that if all the shares were sold the tax on du Pont would be $630,000,000, and if half were sold the tax would be $315,000,000.[27] Moreover, du Pont has no foreseeable need for the net cash proceeds in its present business (see *supra*, p. 63, n. 24), so that the proceeds would be unproductive unless invested in other businesses. The alternative, again, would be to distribute the proceeds as an extra dividend, in which case stockholders would pay an ordinary income tax to receive proceeds of what now is a capital asset.

The Government has attempted to minimize the burdens to du Pont stockholders of direct sales of General Motors stock by referring to the capital appreciation realized, and dividends received, by du Pont in the past (Br. 71-2). The

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[27] If only half were sold and the other half distributed, individual du Pont stockholders would also have to pay income taxes on the distribution as discussed under A above.

undersigned submit that this is an irrelevant and unworthy argument. The present du Pont stockholders are not, in most cases, the same persons who profited through the years from General Motors dividends and capital appreciation. A large portion of them are recent purchasers of du Pont stock at prices already reflecting the past dividend income and the capital appreciation,[28] and these new investors face all the burdens of divestiture without having received the benefits referred to.

What is even more fundamental, the capital appreciation is not a "fruit" of the violation. The value of the General Motors stock did not rise because of the intercorporate relationship but because of the prosperity of the automobile industry and General Motors. Rather than saying, as the Government does, that the capital appreciation resulted "by reason of a holding of stock adjudged illegal" (Br. 72), it would be more accurate to state that the acquisition became unlawful, long afterward, only because General Motors had grown into the "colossus" of the automobile industry, so that the quantity of sales of finishes and fabrics to it finally represented a substantial portion of the sales of these products to the entire industry (353 U.S. at 595).

In addition, if du Pont should "choose" to divest a substantial part of the General Motors stock by means of sales, it is clear on the record that this could *not* be done "without appreciable or significant effect on the market price of General Motors stock" (*cf.* Govt. Br. 72-3; see also

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[28] See Govt. Br. 67, where the Government refers to the "hundreds of thousands of shares of du Pont common stock" purchased at "recent prices." Also see Mr. Bicks' testimony before the Senate Committee on Finance (*op cit.* p. 45) at 326, 331-2, where Mr. Bicks noted that du Pont stockholders ("other than Delaware and Christiana") are innocent and "fairly recent purchasers."

supra; p. 58, n. 18). If the sale of some 20,000,000 shares of General Motors stock by a trustee, together with disorganized selling by stockholders, would be likely to depress seriously the market price, as the District Court found with respect to the Government's original proposal, the sale by du Pont itself of an equal or larger quantity—especially if combined with taxable distributions—is not likely to cause a lesser burden.[29] Indeed, the evidence and arguments on which the Government relies to support its assertion that there would be no appreciable or significant effect (Br. 73-8) are essentially the same as those which it relied upon to support the feasibility of its original plan and which the District Court found unpersuasive (as discussed *supra*, pp. 47-51).

In sum, it would seem that when the grave faults of the Government's original proposal had been exposed, it had the opportunity and obligation to produce some alternative other than by unsupported assertions of counsel on appeal. The Government should not be in a position to argue that further hearings will magically produce feasible alternatives. Nor should it be permitted to shift the burden to the defendants to prove, and the Court below to find, that it is not feasible to carry out divestiture without undue financial losses to stockholders (Govt. Br. 59). To require such proof of a negative would involve the trial court in an endless inquiry.

In Points I and III of this brief it has been shown that, in any event, there is no need to impose divestiture. In the

[29] Presumably the minimum that du Pont could choose to sell would still be some 20,000,000 shares, as in the original proposal, unless the Government here means to abandon its insistence that no shares be distributed to Christiana or Delaware or the stockholders of Delaware. Possibly the Government does mean to drop the last category, for there is no mention of it in the Government's description of its plan (Br. 8).

following Point V it will be seen that the present judgment itself will afford ample opportunity to reconsider its terms in the event of remedial tax legislation or in light of experience or changed circumstances. Hence, there is no virtue in continuing an unnecessary and obviously fruitless search for another plan at this time.

V.

THE DISTRICT COURT'S RETENTION OF JURISDICTION TO RECONSIDER THE QUESTION OF DIVESTITURE IN THE EVENT THAT (i) THE PRESENT DECREE PROVES INADEQUATE IN ACTUAL EXPERIENCE, OR (ii) THERE IS ENACTED REMEDIAL TAX LEGISLATION, GIVES ULTIMATE ASSURANCE THAT THE ANTITRUST OBJECTIVES WILL BE EFFECTIVELY ACHIEVED, BUT THAT UNNECESSARY INJURY TO INNOCENT PERSONS WILL BE AVOIDED

The provisions for retention of jurisdiction in the judgment (Sections IX and XII, R. 3309-10, 3312) illustrate the District Court's care in devising a combination of provisions, particularly suited to the needs of this case, to meet antitrust requirements with maximum effectiveness and minimum injury to innocent parties.

The retention of jurisdiction covers two quite distinct possibilities: the District Court will re-examine the judgment (1) if the present provisions should prove inadequate in actual experience, or (2) if there should be remedial tax legislation comparable to that available under the Public Utility Holding Company Act and other divestiture statutes.

The former is of prime importance. It is expressed without limitation and is thus available as an all-inclusive

guarantee of effective enforcement. In the words of the District Court's opinion, "If the provisions of the decree • • • should prove in the future to be inadequate to curb the violation, the door of the Court is open to the Government to petition for a modification of the judgment at any time" (R. 3247). As seen in Point III *supra*, the other provisions of the judgment are themselves painstakingly devised to assure that all gates are securely locked and all gaps are securely mended, but if experience should prove otherwise, the Court's retention of jurisdiction is a second fence to assure absolute security in the future. Thus, if the judgment should prove inadequate in actual experience, the Government would have opportunity to petition the District Court to enlarge the injunctive provisions (such as those in Section V, relating to trade relationships) or to order complete divestiture.[1]

The other feature of the retention of jurisdiction, relating to tax legislation, looks in a different direction but is also motivated by the District Court's basic concern to achieve maximum effectiveness with minimum loss or harm to innocent persons. The Court was fully apprised of the unusually burdensome tax effects of programs involving direct distribution of General Motors shares to du Pont stockholders (see Point IV-A above). It was also aware that the need for special tax relief had been urged by those

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[1] *Cf. Associated Press* v. *United States*, 326 U.S. 1, 22-3 (1945); *Maryland & Virginia Milk Producers Associaton* v. *United States*, 362 U.S. 458, 472-3 (1960); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 604 (1951); *United States* v. *American Can Co.*, 234 Fed. 1019, 1021 (D.Md., 1916), *appeal dismissed*, 256 U.S. 706 (1921); *United States* v. *Imperial Chemical Industries*, 105 F. Supp. 215, 244, 246 (S.D.N.Y., 1952); *United States* v. *Aluminum Company of America*, 91 F. Supp. 333, 418 (S.D.N.Y., 1950).

administering other divestiture statutes,[2] that several such measures had been enacted in the past, and that there was pending in the 86th Congress, with the support of (among others) the Treasury Department and the Department of Justice, comparable legislation to give tax relief to innocent parties in antitrust situations such as the present (R. 3189-90, 3210, 3261-2). The Court obviously could not tell Congress what it should do, nor could it foretell what Congress would do. But the Court recognized that, in achieving the delicate balance between assuring effective enforcement and avoiding unnecessary and injurious side-effects, there might be all the difference in the world between having and not having relief from oppressive taxes on innocent parties.[3]

By its opinion and judgment, including the retention of jurisdiction, the Court said, in effect, that it was possible

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[2] For example, with reference to the Public Utility Holding Company Act, the then Chairman of the Securities and Exchange Commission testified as follows with reference to the legislation which subsequently became §§ 1081-3 of the Internal Revenue Code:

> • • • our big job at the Commission is to put the private utility house in order. We think we can do it, and we think we can do it expeditiously and constructively if this tax barrier is removed.
>
> • • • We down at the Commission do not desire to put the gun at the head of a utility company and say, "transfer these," and then to have another branch of the Federal Government collect $2,000,000, or $1,000, or $250,000 as the result of doing what we are forcing it to do. [*Hearings on H. R. 9682 before the Senate Committee on Finance*, 75th Cong., 3rd Sess., Part 4, 73 (1938).]

[3] Strictly from the viewpoint of du Pont stockholders, it would undoubtedly be preferable to have their pro rata interest in General Motors stock distributed to them and thus separated from their du Pont stock, if this could be done without the intolerable consequences discussed in Point IV. This is impossible, however, without new legislation, and for this reason the undersigned Dallstream testified in support of, and entertains the hope of eventual enactment of, appropriate legislative relief.

to formulate a thoroughly effective mode of relief without harsh tax effects on innocent persons, but that it would re-examine the whole question of relief, and possibly arrive at a new balance and a different judgment, if future tax legislation should lift the oppressive weight of taxes under present law or, without tax legislation, if changed events or experience should prove the judgment inadequate.

CONCLUSION

The judgment below gives every assurance that the offensive effects of the acquisition will be effectively eliminated, without injury to innocent persons. Further, it contains built-in assurance that both the need and consequences of divestiture may be re-examined by the Court below in light of experience or changed circumstances. It is respectfully submitted that the judgment is fully in accord with the mandate, fully meets the needs of this case, and should be affirmed.

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